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No. (1)

In the Supreme Court of the United States

STEPHEN M. BELL,

PETITIONER,

v.

RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Strickler v. Greene*, 527 U.S. 263, 287-88 (1999), this Court explained that a federal habeas petitioner has "cause" for failing to raise a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), in the state courts if the underlying evidence was suppressed by the State. This Court reserved decision as to whether cause might be negated if the defendant had actual knowledge of the factual basis for his *Brady* claim, and the ability to obtain the necessary proof through the exercise of reasonable diligence. In this case, a deeply divided *en banc* Sixth Circuit joined several other circuits in holding that defendants are charged with constructive knowledge of all information that was "publicly available" or that a reasonably diligent defender could have uncovered from another source—and that the government has no obligation under *Brady* to disclose such information even if it is exculpatory and known to the prosecution. The question presented is:

Whether the Sixth Circuit erred in denying Bell relief on his *Brady* claim, based on its holding that a defendant cannot prove "suppression" under *Brady*, or "cause" to excuse a procedural default, if the exculpatory or impeachment evidence in question was available to the defendant through public sources or diligent investigation.

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OPINIONS BELOW

The Sixth Circuit's *en banc* opinion is reported at 512 F.3d 223. App-1a. The Sixth Circuit's panel opinion is reported at 460 F.3d 739, App-80a, and the court's order granting rehearing *en banc* is reproduced at App-140a. The district court's opinion is reproduced at App-59a.

JURISDICTION

The Sixth Circuit's *en banc* opinion was issued on January 4, 2008. On March 21, 2008, Justice Stevens extended the time to file the petition for certiorari to and including June 2, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in relevant part, provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A jailhouse informant named William Davenport testified that Stephen Bell had confessed to murdering two people. Davenport testified that Bell admitted that he shot Herman Wallace in a fight and then murdered Jean Wallace because she was a witness, and that he was not remorseful. Davenport's testimony eviscerated Bell's mistaken identity defense. As the prosecutor later admitted, Davenport's testimony also provided the State with its only evidence of motive and intent—including the only evidence of premeditation sufficient to convict Bell of the first-degree murder of Mrs. Wallace.

Discovery in federal habeas proceedings later revealed that, despite affirmatively assuring Bell that no such evidence existed, the prosecution withheld impeachment evidence that would have gravely undermined Davenport's credibility. Notwithstanding the prosecution's misconduct, a sharply divided *en banc* Sixth Circuit rejected Bell's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), because the evidence suppressed by the prosecution was contained in public records and therefore could theoretically have been discovered by Bell if he had conducted a diligent investigation. The Sixth Circuit's decision conflicts with this Court's decisions in *Strickler v. Greene*, 527 U.S. 263 (1999), and *Banks v. Dretke*, 540 U.S. 668 (2004), and sharpens a deep existing conflict among eleven federal circuits. The Sixth Circuit's rule (and similar rules adopted in several other circuits) is profoundly unfair to defendants and threatens to revive the prosecutorial deception and gamesmanship that *Brady* was meant to eliminate. Review is warranted.

Factual History

1. On September 6, 1986, Mr. and Mrs. Wallace were shot in their camp, located underneath a bridge in Nashville, Tennessee. Mrs. Wallace died at the scene and Mr. Wallace died three days later. Bell was arrested the evening of the shooting because his clothes matched a general description given by some witnesses at the crime scene. Bell was in possession of bullets of the same type that killed the Wallaces, spent cartridges at the crime scene matched spent cartridges found near Bell's camp, and laboratory results indicated that he could have recently fired a gun. But no eyewitness could positively identify the shooter, no

murder weapon was found, and, although the victims were shot at close range inside a tent, laboratory testing failed to uncover any blood on Bell's clothing. *See State v. Bell*, C.C.A. No. 88-138-II, 1989 WL 86583 (Tenn. Crim. App. Aug. 4, 1989). Bell was charged with two counts of first-degree murder.

2. Prior to trial, Bell's counsel made a specific request for all exculpatory and impeachment evidence from the prosecution. In particular, Bell requested: "The nature and substance of any government promise or understanding between the government or any agent thereof and any witnesses relating to the witness's expected testimony, including but not [limited] to understanding[s] or agreements related to pending or potential prosecutions," "[t]he nature and substance of any preferential treatment given at any time by any state agent, whether or not in connection to this case[,] to any potential witness," and "[t]he FBI and state arrest and conviction records of each witness the state intends to call in this matter." CAJA 440-41.

The prosecutor responded with a brief letter that assured the defense that the letter contained "all the discoverable information in my file." CAJA 499. The letter did not provide any information about William Davenport.

3. Prior to Bell's trial, Davenport and Bell were (briefly) in the same jail. Davenport was in jail this time on a parole violation and had other charges pending, including grand larceny, concealing stolen property, and writing worthless checks. CAJA 254-56, 261. Davenport had previously been convicted of receiving stolen property, forgery, and obtaining property by false pretenses. CAJA 258-60.

At trial, Davenport testified that Bell had "confessed" to him that he had murdered the Wallaces. CAJA 256-57. He testified that Bell confessed to being in an argument with Mr. Wallace about a dog and that he was angry and intoxicated. Davenport testified that he asked Bell: "Well, why did you shoot the woman; what was the purpose of shooting her?" CAJA 257. Bell's response, according to Davenport, was that he shot her because "she was there" and that he was not remorseful. *Id.* Defense counsel attempted to impeach Davenport's credibility by questioning him about his prior convictions and recent parole violation, and asked him about his parole eligibility date. CAJA 258-60, 262-63. The defense, however, had no evidence to impeach Davenport's motives for testifying.

In closing, the prosecutor bolstered Davenport's credibility by assuring the jury that there was no such evidence. He praised Davenport's selfless motivation: "Bill Davenport told you that the man came there and told him what had happened and he had no remorse and no sorrow whatsoever and that is why he was in here testifying and telling you what he heard." CAJA 277. The prosecutor also told the jury that the defense's suggestion that Davenport "wants an early parole through our office or through me" was not true, and declared that his office had no "say-so with the Parole Board" and that he could not assist Davenport in securing early release. *Id.*

Bell was convicted of first-degree murder of Mrs. Wallace and second-degree murder of Mr. Wallace. Davenport's testimony provided the only evidence of identity and motive, and the only evidence sufficient to establish the requisite element of premeditation for the

first-degree murder of Mrs. Wallace. *See State v. Johnson*, 661 S.W. 2d 854, 860 n.1 (Tenn. 1983).

4. The Tennessee Court of Criminal Appeals affirmed Bell's conviction on direct appeal, 1989 WL 86583, and the Tennessee Supreme Court denied permission to appeal. Bell then sought collateral relief in state court. The trial court denied relief, and the court of appeals affirmed. On January 3, 1995, the Tennessee Supreme Court denied Bell permission to appeal. App-10a.

Federal Habeas Proceedings

1. On June 12, 1995, prior to the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Bell timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. App-10a. His petition was later transferred to the Middle District of Tennessee and, on October 23, 1998, the district court dismissed the petition without prejudice for inactivity. *Id.* On March 19, 1999, Bell filed a motion to reopen his case, which the district court granted. *Id.*; App.-81a-82a. The Warden later moved for summary judgment and the district court granted the motion on the majority of Bell's claims.

However, discovery uncovered for the first time substantial exculpatory evidence that had been withheld from Bell. It was discovered that Davenport had unilaterally solicited a meeting with prosecutors, CAJA 472-73, telling them that he wanted a work-release program, a transfer to "Red Building," a preferred minimum-security facility, and early parole, and in turn offered to testify concerning Bell's confession and lack of remorse. App-8a-9a, 30a. The prosecutor had taken notes during the meeting

memorializing Davenport's requests, adding at the bottom, "3 yrs @ 30%" and "Get out in May '87." CAJA 336.

Shortly thereafter, four pending charges against Davenport were dropped. CAJA 490-93. On two other charges, Davenport was sentenced to a three-year term to be served concurrently with time he was already serving. *Id.* Thus, within weeks of his meeting with prosecutors, that office ensured that the six pending charges against Davenport were neatly resolved.

It was also learned for the first time that within two weeks of Bell's trial, and within the time that Bell could have sought a new trial, Tenn. R. Crim. P. 33, the prosecutor wrote the parole board a letter requesting that they grant Davenport parole at the earliest possible date. CAJA 501. This was the same prosecutor who had just assured the jury that Davenport had not come to the office seeking early parole and that his office had no "say-so with the parole board." In the letter, the prosecutor conceded that the state "did not have a strong case without the testimony of William Davenport" and that prior to meeting with Davenport the state "did not have any idea as to the motive for the killings." *Id.* Davenport was granted early parole four months later and six months prior to his parole eligibility date. The sole notation at the bottom of the parole board's decision granting early release was "See DA's letter supporting parole." CAJA 331.

2. The district court held an evidentiary hearing on Bell's *Brady* claim. The prosecutor testified that when he met with Davenport, Davenport "mentioned something to me about" wanting early parole. CAJA

477. And despite having assured the jury of Davenport's noble motivation for testifying, the prosecutor conceded that he was "sure Davenport wanted something" in return for his testimony. CAJA 476. However, he denied having made any explicit deal with Davenport. App-12a.

The district court found that Davenport's request to be transferred to another facility should have been disclosed to the defense. *Id.* 77a-78a. However, the court found that the prosecutor's letter to the parole board could not have been disclosed because it was written after the trial. *Id.* 78a. The court did not address the failure to disclose the favorable resolution of the pending charges against Davenport. Considering only the failure to disclose Davenport's request to be transferred to a new facility, the district court held that Bell had not shown "a reasonable probability of acquittal to justify the writ." *Id.*

3. A panel of the Sixth Circuit reversed. App-80a-81a. The court held that the prosecution violated Bell's *Brady* rights by withholding: (1) the notes of the meeting with Davenport; (2) the sentencing records favorably resolving the pending charges against Davenport; and (3) evidence of a tacit agreement between Davenport and the prosecutor. *Id.* 101a; *see also id.* 131a. The court held that Bell had demonstrated "cause" for failing to raise the claim in state court because Bell "was under no obligation to second guess the prosecution's representation that no impeaching evidence existed as to Davenport." *Id.* 114a. And it found "prejudice," because "Davenport's testimony was the crux of the prosecution's case." *Id.* 121a.

4. The Warden successfully sought rehearing *en banc*. The sharply divided *en banc* court held that the notes of the prosecutor's meeting with Davenport should have been disclosed. It held, however, that there was no *Brady* violation with respect to Davenport's sentencing records because the "records were publicly available" and "Bell could have obtained access to them." *Id.* 21a-22a. The majority held that "[w]here, like here, 'the factual basis' for a claim is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense.'" *Id.* 22a (quotation marks and citations omitted). The majority held that a defendant is responsible for finding "publicly available" documents or information "'reasonably available' ... from another source" even if the prosecutor has explicitly represented that no such information exists. *Id.* 21a-22a. Considering only the notes of the meeting and not the sentencing records or letter to the parole board, the majority also held that Bell could not demonstrate "prejudice." *Id.* 25a-26a.

Judge Clay wrote for five dissenting judges. He faulted the majority for "disregard[ing] the reasoning of the Supreme Court and blam[ing] Petitioner for refusing to discover evidence the prosecution said did not exist." *Id.* 27a. He warned that the majority's holding "threatens to reintroduce the gamesmanship that *Brady* and its progeny were designed to prevent." *Id.* 34a. Judge Clay reasoned that "a prosecutor's false or misleading statement disclaiming the existence of *Brady* material obviates the need for a petitioner to conduct an independent investigation," and that such evidence is suppressed by the prosecution regardless of whether it is available from another source. *Id.* 34a-

35a. According to the dissent: "The rule emerging from *Strickler* and *Banks* is clear: Where the prosecution makes an affirmative representation that no *Brady* material exists, but it in fact has *Brady* material in its possession, the petitioner will not be penalized for failing to discover that material." *Id.* 36a-37a.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly emphasized that "[a] rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696. Prosecutors must disclose all exculpatory and impeachment evidence they possess to defendants, and non-disclosure violates due process if (1) the evidence was favorable to the accused; (2) it was suppressed; and (3) prejudice ensued. *Strickler*, 527 U.S. at 281-82. This Court clearly held in *Strickler* that a defendant cannot be expected to uncover undisclosed *Brady* material when that material is in the control of the State. *Id.* at 287-88. It also explained that the "cause" and "prejudice" requirements for excusing a prior procedural default on federal habeas review "parallel two of the three components" of a *Brady* violation, suppression and materiality, and that therefore a meritorious *Brady* claim generally establishes cause and prejudice. *Id.* at 282. This Court specifically reserved decision, however, about whether "cause" for failing to raise a *Brady* claim previously might be negated by proof that the defendant "was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Id.* at 288 n.33.

The federal circuits have since divided into two camps over the question this Court reserved in

Strickler. Several courts of appeals (including the Sixth Circuit here) have interpreted the possible exception this Court reserved in *Strickler* so expansively as to undermine the core holding of *Strickler*, and indeed of *Brady* itself. The *en banc* Sixth Circuit held that a defendant can never establish either suppression or cause, despite the government's withholding of exculpatory evidence in its files, if the evidence in question was "publicly available" or "reasonably available" from another source. The First, Second, Third, Seventh, Eighth, and Eleventh Circuits agree. By contrast, the Fourth, Fifth, Ninth, and Tenth Circuits have held that *Brady* focuses on the prosecution's misconduct, not the defendant's diligence, and that if exculpatory or impeachment material is suppressed by the prosecution its availability to the defendant through other sources is wholly irrelevant.

Bell would clearly have prevailed in those latter circuits. The position adopted by the Sixth Circuit (and six others) misunderstands the question this Court reserved in *Strickler* and conflicts with this Court's holdings in *Strickler* and in *Banks*. By encouraging prosecutors to withhold exculpatory or impeachment material that the defendant might be able to discover in some other way, the rule endorsed here profoundly limits and redefines the scope of a prosecutor's *Brady* obligations, ignores the special role played by the prosecutor in the search for truth in criminal trials, and encourages gamesmanship that this Court has repeatedly held to be intolerable in a system designed to accord defendants due process. That rule wrongly infects countless disclosure decisions made on a daily basis by prosecutors on the front lines of the criminal justice system.

Worse yet, the Sixth Circuit held that a defendant cannot reasonably rely on the prosecution's affirmative representation that it has turned over all *Brady* material in the government's possession. The Sixth Circuit held that it was not reasonable for Bell to have relied on the prosecutor's assurances that all *Brady* material had been disclosed, because the evidence was "was a matter of public record," App-24a, and was therefore "'reasonably available' ... from another source," *id.* 22a. In other words, the prosecution may not only withhold exculpatory or impeachment evidence from the defendant if that information is technically available elsewhere, but may also affirmatively mislead the defendant to discourage the "diligent investigation" the court thinks the defendant should have conducted.

The Second, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have held that defendants cannot be faulted for relying on such representations. Even the Second, Third, and Eleventh Circuits, which generally join the Sixth Circuit in burdening defendants with constructive knowledge of everything reasonably available to a diligent defender, recognize that a defendant's knowledge or reasonable access to exculpatory evidence can be nullified when the prosecutor affirmatively misleads the defense. These holdings are consistent with this Court's observation that such an affirmative representation "not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist," with the consequence that "[i]n reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it

otherwise would have pursued." *United States v. Bagley*, 473 U.S. 667, 682 (1985). And in *Banks*, like *Strickler*, this Court explained that "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695; *id.* at 698 ("It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful.").

Finally, the lower courts have become deeply confused about the relationship between the substantive scope of *Brady* and the cause-and-prejudice standard on federal habeas. *Brady* and its progeny impose a clear obligation on prosecutors to turn over all exculpatory and impeachment material in their possession. The issues of the defendant's own knowledge or lack of diligence were raised in *Strickler* under the rubric of the cause-and-prejudice standard because the defendant had procedurally defaulted his *Brady* claim in state court. But the circuit courts have extended this Court's observation in *Strickler* that "suppression" is generally sufficient to prove "cause" in a habeas case to embrace the inverse (and incorrect) proposition that a showing of "cause" is necessary to prove "suppression" under *Brady* even in cases arising on direct review or involving no procedural default in state court. The Sixth Circuit, along with at least the First, Second, Third, Seventh, Eighth, and Eleventh Circuits, holds that "[w]here ... 'the factual basis' for a claim is 'reasonably available to' the petitioner or his counsel from another source, *the government is under no duty to supply that information to the defense.*" App-22a (quotation marks and citations omitted)

(emphasis added). That holding confuses the government's duties under *Brady* with the defendant's duty to diligently present claims to state courts before seeking habeas relief in federal court. Although that distinction does not drive the outcome here (this case is on habeas review), it is extremely important, the Sixth Circuit has already applied it to cases on direct review, and this Court could easily clarify the governing principles in the course of resolving this case.

This case presents several related issues of overwhelming national importance to the criminal justice system and to individual defendants. In several of this Court's major *Brady* cases, the prosecution has argued that a showing that the evidence was "reasonably available" from another source defeats a defendant's claim.[1] This Court has consistently declined to embrace such a rule, but it nonetheless has become the law in many federal circuits. The Sixth Circuit's decision is profoundly important and it is fundamentally wrong. The circuit courts are deeply divided, and Bell would have received habeas relief if his case had arisen in at least four and likely seven other circuits. Review is warranted.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

The Sixth Circuit's decision cannot be reconciled with this Court's decisions in *Strickler* and in *Banks*, and undermines the core values underlying *Brady*.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused

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[1] *See, e.g., Banks*, 540 U.S. at 696; *Strickler*, 527 U.S. at 284; *United States v. Agurs*, 427 U.S. 97 (1976).

upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. This includes evidence that "would tend to exculpate him or reduce the penalty," *id.* at 87-88, as well as impeachment evidence, *Bagley*, 473 U.S. at 676; *see also Giglio v. United States*, 405 U.S. 150, 154 (1972). The prosecution's broad disclosure obligations are an "affirmative duty," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), that apply even when the defendant makes no request. *United States v. Agurs*, 427 U.S. 97, 107 (1976). The prosecution's disclosure obligation "can trace its origins to early 20th-century strictures against misrepresentation," *Kyles*, 514 U.S. at 432, and it "illustrates the special role played by the American prosecutor in the search for truth in criminal trials," *Strickler*, 527 U.S. at 281; *see also Berger v. United States*, 295 U.S. 78, 88 (1935).

In *Strickler*, the prosecution failed to turn over evidence that could have been used to impeach a prosecution witness. The court of appeals held that the defendant could not establish cause for failing to raise the claim in state court, notwithstanding the prosecution's maintenance of an "open file" policy,[2] because the information could have been discovered independently by "reasonably competent" counsel. 527 U.S. at 279 & n.18. And the State argued that "the prosecution's maintenance of an open file policy that

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[2] An "open file" policy is a practice adopted by many jurisdictions to comply with *Brady* by giving the defendant access to the prosecutor's file on the case. The prosecution represents that all material that *Brady* requires to be disclosed is in the open file.

did not include all it was purported to contain is irrelevant because the factual basis for the assertion of a *Brady* claim was available to ... counsel." *Id.* at 284-85. This Court rejected that reasoning and held that the defendant established cause.

This Court explained that the claim in *Strickler* was not previously raised for three reasons: "The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy; and trial counsel was not aware of the factual basis for the claim." *Id.* at 283 (footnote omitted). This Court stated that "[t]he first and second factors—*i.e.*, the nondisclosure and the open file policy—are both fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim. ... [I]t is just such factors that ordinarily establish the existence of cause for a procedural default." *Id.* This Court emphasized that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Id.* at 283 n.23.

This Court also rejected the State's argument that *McCleskey v. Zant*, 499 U.S. 467 (1991), and *Gray v. Netherland*, 518 U.S. 152 (1996), precluded a finding of cause. This Court explained that in both cases "the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier." 527 U.S. at 287. This Court went on to reserve the question, "because it is not raised in this case," of "the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or

could reasonably discover, how to obtain them." *Id.* at 288 n.33.

In *Banks v. Dretke*, the State similarly withheld impeachment evidence after asserting that it would disclose all *Brady* material. 540 U.S. at 675. This Court rejected the State's argument that the cause inquiry revolves around the defendant's conduct and that Banks could have uncovered the evidence with reasonable diligence, explaining that "[w]e rejected a similar argument in *Strickler*. ... Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. This Court further stated that "Banks cannot be faulted for relying on [the prosecutors'] representation," *id.* at 693, and that "[i]t was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful." *Id.* at 698.

Under this Court's precedents, therefore, the mere fact that the evidence "might have been detected" through reasonable diligence is irrelevant: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696. This Court has reserved decision on whether a defendant can demonstrate cause for failing to raise a *Brady* claim if the defendant had *actual knowledge of the factual basis of such a claim*, and could have obtained the necessary documents or proof through diligent investigation. *Strickler*, 527 U.S. at 287-88. But this Court has never charged defendants with constructive knowledge of all materials in public files, or that

hypothetically could have been discovered with a diligent investigation.

The Sixth Circuit (like six other circuits) has fundamentally misunderstood the question this Court reserved in *Strickler*—which concerns defendants who had *actual knowledge* of the factual basis for a *Brady* claim and nonetheless failed to investigate with reasonable diligence. Both *Strickler* and *Banks* clearly establish that a defendant without actual knowledge of undisclosed *Brady* material is entitled to rely on the State to faithfully discharge its *Brady* obligations. *Id.* at 283-85; *Banks*, 540 U.S. at 693, 695-96, 698. But the Sixth Circuit has now held that defendants are charged with constructive knowledge of all evidence in public files or that could have been uncovered with a reasonably diligent investigation—which is another way of saying, *contra* the square holding of *Strickler* and *Banks*, that defendants *are not* entitled to rely on the prosecution's representations of compliance with *Brady* and must investigate anyway.

Bell is entitled to relief under *Strickler* and *Banks*, properly understood. Bell had no knowledge or notice of the factual basis of his *Brady* claim: that Davenport had sought out the prosecution and requested numerous favors in return for his testimony and shortly thereafter the prosecution had dropped four pending charges against Davenport, entered into a favorable plea arrangement on two others, and intended to support his parole application in return for his testimony.[3] The court of appeals held that "the

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[3] The prosecutor's letter to the parole board should have been disclosed, notwithstanding that it was not written until after trial. A prosecutor's *Brady* obligations do not conclude with the verdict, and the letter would have been useful in supporting Bell's motion

known fact of Davenport's incarceration strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file, and the information was a matter of public record." App-24a. But even if knowledge of Davenport's incarceration puts Bell on notice that further records relating to Davenport may exist, it certainly *does not* charge Bell with actual knowledge that those records contained exculpatory or impeachment material that should have been disclosed under *Brady*. Under this Court's precedents, Bell was entitled to believe the prosecution's statement that it had already disclosed all such material in its possession.

Moreover, like *Strickler* where the prosecution continued to affirmatively represent during habeas proceedings that it had "voluntarily given full disclosure of everything known to the government," 527 U.S. at 287 & nn.31-32, at Bell's trial the prosecutor expressly told the jury (1) that Davenport's only reason for testifying was altruistic; (2) that they should not believe any suggestion that Davenport was seeking favorable treatment or early parole from the prosecution; and (3) that the prosecutor's office had "no say-so" with the parole board. Like *Strickler*, therefore, Bell has established cause because: (a) the prosecution withheld exculpatory evidence; (b) Bell reasonably relied on the prosecution's representation that it had disclosed all exculpatory evidence in its files; and (c) the State confirmed Bell's reliance on the prosecution's representation by continuing to assert

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for a new trial. *E.g.*, *Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004) ("Even a prompt disclosure after the verdict would have been useful in supporting defendant's motion for a new trial ....").

that Davenport had neither sought nor would receive any favorable treatment in return for his testimony.

The Sixth Circuit has essentially embraced an argument that prosecutorial authorities have repeatedly advanced in *Brady* cases, and that this Court has squarely rejected. *Brady* imposes a clear and unambiguous obligation on prosecutors to turn over *all* exculpatory or impeachment material in the State's possession, in order to eliminate any incentives for strategic withholding or gamesmanship. Criminal defendants generally do not have the resources to file FOIA requests or to scour government warehouses or databases that are theoretically open to the public. By holding that disclosure is not required if the information is available to the defendant in other ways, the Sixth Circuit invites prosecutors to play all manner of games—and to intentionally conceal from criminal defendants information that may be essential to the fair pursuit of truth.

II. THE SIXTH CIRCUIT'S DECISION SHARPENS AN ELEVEN-CIRCUIT SPLIT OF AUTHORITY

A. The Sixth Circuit's Test For "Suppression" And "Cause" Conflicts With Decisions Of Other Courts Of Appeals

The Sixth Circuit's rule that prosecutors need not disclose exculpatory or impeachment evidence that was publicly available or could have been discovered by a diligent investigation is also followed by the First, Second, Third, Seventh, Eighth, and Eleventh Circuits. The Fourth, Fifth, Ninth, and Tenth Circuits, however, have squarely held that the availability of information

from other sources does not change the prosecutor's obligation to disclose.

1. Specifically citing the question reserved by this Court in *Strickler*, the Eleventh Circuit has held that: "We do not read *Strickler* ... to indicate that defense reliance on a general government representation of compliance with *Brady* establishes cause" where counsel "reasonably could have discovered" evidence suggesting additional exculpatory material existed from another source. *High v. Head*, 209 F.3d 1257, 1265 (11th Cir. 2000), *cert. denied*, 532 U.S. 909 (2001). And it has held that "[t]he government is not obliged under *Brady* to furnish a defendant with information which ... with any reasonable diligence, he can obtain himself." *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir.) (citation omitted), *cert. denied*, 493 U.S. 932 (1989); *see also Jennings v. McDonough*, 490 F.3d 1230, 1238-39 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1762 (2008). Although this Court has consistently described a three-pronged *Brady* inquiry, the Eleventh Circuit applies a four-pronged test, adding the requirement "that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence." *United States v. Svete*, 521 F.3d 1302, 1313 (11th Cir. 2008).

Likewise, the Seventh Circuit holds that "[e]vidence is suppressed for *Brady* purposes only if ... the evidence *was not otherwise available* to the defendant through the exercise of reasonable diligence." *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001) (emphasis added), *cert. denied*, 535 U.S. 1078 (2002). The Seventh Circuit does not even require a defendant to have a "specific lead" if a "reasonably

diligent defendant" could have uncovered the evidence. *Id.* at 747 (Flaum, J., dissenting on other grounds).

The Eighth Circuit similarly holds that "[l]ack of production by state officials is not cause excusing procedural default if the information the officials failed to produce is reasonably available through other means," *Zeitvogel v. Delo*, 84 F.3d 276, 279-80 (8th Cir.), *cert. denied*, 519 U.S. 1036 (1996), and that evidence is not "suppressed" if the defendant can uncover it "by the exercise of reasonable diligence," *United States v. Stuart*, 150 F.3d 935, 937 (8th Cir. 1998).

The First Circuit agrees that "[t]he government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender." *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998), *cert. denied*, 526 U.S. 1152 (1999); *Lugo v. Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) (prosecution has duty to disclose evidence "within its exclusive control," but it has "no such burden" when the evidence suppressed was "a matter of public record" and "readily available to a diligent defender").

The Second Circuit explicitly "recognize[s] an exception to the disclosure obligation where the defendant or his attorney 'either knew, *or should have known*, of the essential facts permitting him to take advantage of [that] evidence.'" *United States v. Jackson*, 345 F.3d 59, 73 (2d Cir. 2003) (citation omitted) (emphasis added) (alteration in original), *cert. denied*, 540 U.S. 1157 *and* 541 U.S. 956 (2004) *and* 546 U.S. 925 (2005). In *Disimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006), the court reasoned that even though the defendant "meets the three requirements of *Brady* ... there is also a fourth prerequisite for a successful

Brady claim. 'Evidence is not "suppressed" if the defendant either knew or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'" And the Second Circuit has held that "[d]ocuments that are part of public records are not deemed suppressed if defense counsel *should know of them* and fails to obtain them because of lack of diligence in his own investigation." *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) (emphasis added), *cert. denied*, 516 U.S. 1165 (1996).

The Third Circuit previously rejected the rule applied by the Sixth Circuit, but has changed course and now embraces a rule requiring a defendant to undertake a diligent investigation. In *United States v. Oxman*, the Third Circuit held that "it is not the law that exculpatory evidence in the government's file is not *Brady* material if the defendant might have uncovered it through independent sources." 740 F.2d 1298, 1312 (3d Cir. 1984), *vacated by United States v. Pflaumer*, 473 U.S. 922 (1985). The court reasoned that "[i]t is simply not the policy of *Brady* to encourage pre-trial guessing games over whether the defendant might have an independent source for suppressed exculpatory evidence." *Id.* at 1313.

In *United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006), however, the Third Circuit held that "*Brady* does not compel the government 'to furnish a defendant with information which ..., with any reasonable diligence, he can obtain himself.'" (Citation omitted.) "[D]efense knowledge of, or access to, purportedly exculpatory material is potentially fatal to a *Brady* claim, even where there might be some showing of governmental impropriety." *Id.* at 215. The court reiterated those principles in

United States v. Joyce, 257 Fed. Appx. 501, 504-05 (3d Cir. 2007), holding that the prosecution could withhold impeachment evidence concerning criminal charges against a witness because "it would not have been unreasonable [for defendants] to have periodically searched the criminal dockets of the federal district courts in the Eastern District of Pennsylvania or the District of New Jersey, the two jurisdictions in which they knew, or could have known with reasonable diligence, that [a potential witness] was under criminal investigation." *Id.* at 505.

2. The Fourth, Fifth, Ninth, and Tenth Circuits apply a far more stringent rule, essentially answering the question reserved in *Strickler* by holding that the defendant's own knowledge is wholly irrelevant to the prosecution's disclosure obligations and to the "cause" inquiry.

The Fourth Circuit used to apply the Sixth Circuit's rule, but no longer does. In *Barnes v. Thompson*, the Fourth Circuit held that "*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation." 58 F.3d 971, 975 n.4 (4th Cir.), *cert. denied*, 516 U.S. 972 (1995); *see also United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("[W]here the exculpatory information ... lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."). Indeed, the Fourth Circuit previously held: "Even assuming 'some interference by officials' ... a petitioner still cannot show cause if the information sought is otherwise reasonably available." *Barnes*, 58 F.3d at 976. The court applied that rule again in *Walker v. True*, 67 Fed. Appx. 758 (4th Cir.

2003), but this Court granted certiorari, vacated the decision, and remanded for further proceedings in light of *Banks*. 546 U.S. 1086 (2006).

On remand, the Fourth Circuit rejected its prior holdings and held that "the cause analysis focuses on prosecutorial misconduct, not on the defendant's diligence." *Walker v. Kelly*, 195 Fed. Appx. 169, 175 (4th Cir. 2006). The State argued that the defendant was in possession of documents that would suggest to a reasonably diligent defender that a prosecution witness was providing inconsistent statements, and also that "it was unreasonable ... to rely on the prosecution's affirmative response [that it had complied with its *Brady* obligations] since Walker could have reasonably discovered all the information." *Id.* at 174-75. And the state courts had even found that Walker "knew of the factual basis underlying his ... *Brady* claim at the time of trial." *Id.* at 171.

The Fourth Circuit nonetheless held that the defendant had no duty to conduct an independent investigation and "was reasonable not only in relying on the presumption that the Commonwealth would faithfully perform its duty to disclose, but also in relying on the explicit representation that the prosecution had disclosed all *Brady* material." *Id.* at 174. The court reasoned that to conclude otherwise would ignore the importance of a prosecutor's duty to disclose and would "condone[] the prosecutor's ability to conceal documents and require[] a defendant to search for *Brady* material." *Id.* at 175.

The Ninth Circuit agrees. In *Gantt v. Roe*, "[t]he district court concluded that the evidence was not 'suppressed' within the meaning of *Brady*, because the defense could and should have discovered it itself." 389

F.3d 908, 912 (9th Cir. 2004). Writing for the court, Judge Kozinski categorically rejected that rule, and held that "[w]hile the defense could have been more diligent ... this does not absolve the prosecution of its *Brady* responsibilities." *Id.* at 912-13. Judge Kozinski reasoned that this

> case presents an even stronger argument for disclosure than does *Banks*, because defense counsel here relied not merely on the force of *Brady* itself, but also—as with the prosecutor's claimed 'open file' policy in *Strickler*, 527 U.S. at 276 n.13—on affirmative representations by the prosecution that it was keeping the defense apprised of developments in the investigation.

Id. at 913. Thus, "[t]hough defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.*[4]

The Tenth Circuit also agrees. In *Banks v. Reynolds*, 54 F.3d 1508, 1514 (10th Cir. 1995), the prosecution argued that it did not have any duty under *Brady* to disclose the information because defense counsel "either knew, or should have known, about the evidence." The Tenth Circuit disagreed. *Id.* at 1516-17; *id.* at 1518 (rejecting rule that "the prosecution has no duty to disclose information which the defense knows or reasonably should know about"). It acknowledged a direct conflict with the Eleventh Circuit's rule, *id.* at 1517 & n.17, and held that the defendant had established cause because "the

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[4] *See also Atkins v. County of Riverside*, 151 Fed. Appx. 501, 504 n.2 (9th Cir. 2005); *Duran v. Thurman*, No. 96-15213, 1997 WL 30243, at *2 (9th Cir. Jan. 23, 1997).

prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge." *Id.* at 1517; *see also United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) ("[W]hether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information."), *cert. denied*, 529 U.S. 1029 (2000); *Scott v. Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.").[5]

The Fifth Circuit also agrees that the defendant's own knowledge is irrelevant in *Brady* cases. In *Johnson v. Dretke*, the defendant's trial was "conducted under the Open File Rule where the state promises to disclose relevant materials." 394 F.3d 332, 335 (5th Cir. 2004). However, the State failed to turn over a co-defendant's stipulation confessing to have been the shooter, and Johnson was sentenced to death. His appeal arose under AEDPA's successive writ provision, which only permits a defendant to proceed if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). The State argued, and the district court found, that Johnson's *Brady* claim was procedurally defaulted because the "stipulation was available in the public record." 394 F.3d at 337. The Fifth Circuit reversed. It categorically held that a defendant is entitled to rely on

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[5] The Tenth Circuit has made the entirely reasonable observation that a defendant's actual knowledge of the basis for the claim could negate a *prejudice* finding, if that knowledge makes the undisclosed evidence cumulative. *See Quintanilla*, 193 F.3d at 1149.

the prosecution's assertions that it has complied with its *Brady* obligations—even under AEDPA's stringent cause requirements for successive writs. "[I]f the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." *Id.* Likewise, the Fifth Circuit "find[s] unpersuasive the State's argument that they ha[ve] no duty to disclose exculpatory evidence that was available in the public record." *Mathis v. Dretke*, 124 Fed. Appx. 865, 877 (5th Cir.), *cert. denied*, 545 U.S. 1131 (2005).

In sum, the Fourth, Fifth, Ninth, and Tenth Circuits hold that defendants can pursue a *Brady* claim despite exculpatory evidence being publicly available or reasonably available from another source, because the prosecution is nonetheless obligated to disclose it and the cause inquiry on habeas focuses on the prosecution's misconduct and not a defendant's diligence. Bell would clearly have prevailed under that standard.

3. This eleven-circuit conflict is mature and entrenched and there is no reason to defer review. Further percolation in the courts of appeals will not lead to further clarity. The circuits are not moving toward reconciliation; the only substantial movement has been that the Third and Fourth Circuits have switched sides. And the Sixth Circuit's holding is no aberration: in recent months it has applied its rule in two additional cases. *See Johnson v. Bell*, No. 04-5377, 2008 WL 1862326, at *25 n.8 (6th Cir. Apr. 29, 2008); *Lewis v. Tennessee*, No. 05-5661, 2008 WL 698935 (6th Cir. Mar. 14, 2008). In *Lewis*, the court held that *Bell* governed and that the "state's failure to turn over the sentencing records of a government witness was not a

Brady violation because those records were publicly available and the petitioner could have obtained them." 2008 WL 698935, at *2. And in *Johnson*, a key prosecution witness who identified the defendant as the killer had filed a notice of an insanity defense in a criminal case against him, which would plainly have been impeachment material. Applying the rule from this case, however, the Sixth Circuit held that "as this document was publically [sic] available, it simply does not present a *Brady* issue." 2008 WL 1862326, at *25 n.8.[6]

B. The Sixth Circuit's Decision Also Conflicts With The Settled Law Of The Second, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits By Ignoring The Relevance Of Prosecutorial Assurances

The Sixth Circuit held that the prosecution's affirmative misrepresentation that it had turned over all discoverable material did not relieve Bell of his supposed obligation to investigate and discover the evidence himself, because the impeachment "information was a matter of public record." App-24a. Even if there were room for disagreement about the scope of a defendant's obligation to conduct an independent investigation to discover *Brady* material,

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[6] This reasoning directly conflicts with the Fifth Circuit's decision in *Mathis*, on materially indistinguishable facts. In *Mathis*, instead of a notice of insanity defense, it was a prosecution witness's competency evaluation from a previous trial that was "available in the public record." 124 Fed. Appx. at 877. The Fifth Circuit held that Mathis reasonably relied on the prosecution's assertion that it had complied with its *Brady* obligations and that the competency evaluation's "'location in the public record, in another defendant's file, is immaterial.'" *Id.* (citation omitted).

several other circuits have held (in keeping with this Court's decision in *Strickler* and the fact that *Brady* itself reflects "20th-century strictures against misrepresentation," *Kyles*, 514 U.S. at 432) that a defendant clearly is entitled to rely on affirmative assurances by the prosecution that investigation would be futile because no undisclosed exculpatory or impeachment material exists in the government's possession.

All of the circuits that have held that defendants have no duty to investigate under *Brady* have also emphasized that defendants are entitled to rely on the prosecution's assurances that it has disclosed all exculpatory and impeachment material. In *Walker*, even though the state courts found that the defendant "knew of the factual basis underlying his ... *Brady* claim at the time of trial," 195 Fed. Appx. at 171, the Fourth Circuit held that the defendant established cause because he "was reasonable not only in relying on the presumption that the Commonwealth would faithfully perform its duty to disclose, but also in relying on the explicit representation that the prosecution had disclosed all *Brady* material." *Id.* at 174. The Fourth Circuit even held that the defendant's possession of some evidence that might have suggested further investigation "does not diminish the reasonableness of Walker's reliance on the Commonwealth's representation that it had complied fully with *Brady*." *Id.* at 174-75.

In *Gantt*, the Ninth Circuit conceded that the defense could have conducted its own investigation, but nonetheless held that "[p]etitioner's case presents an even stronger argument for disclosure than does *Banks*," because "defense counsel here relied not

merely on the force of *Brady* itself, but also—as with the prosecutor's claimed 'open file' policy in *Strickler*, 527 U.S. at 276 n.13—on affirmative representations by the prosecution that it was keeping the defense apprised of developments in its investigation." 389 F.3d at 913.

Likewise, the Fifth Circuit holds that when a trial is conducted under an open-file rule—an affirmative representation that all discoverable material will be placed in the prosecutor's file—a defendant is entitled to rely on that representation regardless of the evidence's existence somewhere in the public record. *Mathis*, 124 Fed Appx. at 877; *Johnson*, 394 F.3d at 337.

The Tenth Circuit similarly holds that a defendant reasonably relies on the prosecution's disclosure obligations and the prosecutor's affirmative representations of compliance, regardless of whether the defendant knew or should have known of the evidence from another source. *Banks*, 54 F.3d at 1511, 1516-17.

Even though the Second, Third, and Eleventh Circuits hold that the prosecutor has no affirmative obligation to disclose evidence the defendant could reasonably uncover elsewhere, they have recognized that, at a bare minimum, the prosecution cannot affirmatively mislead defendants. In *Shih Wei Su v. Filion*, the prosecution contended that the defendant "had some information that a deal *might* have been made" with a prosecution witness. 335 F.3d 119, 128 (2d Cir. 2003). The Second Circuit emphasized, however, that the prosecution "expressly (a) falsely denied before trial that an actual agreement had been reached ... and (b) falsely established on direct

examination that no promises ... had been made to [the witness]." *Id.* The Second Circuit rejected the State's argument that the defendant should have more diligently investigated any possible cooperation deal because "Petitioner would have been required to assume that the prosecutor had lied." *Id.* Citing *Strickler*, the court held that it could not "fault the defendant" for relying on such representations or for not investigating further "on the assumption that the prosecutor is a liar." *Id.*

The Third Circuit too has acknowledged that "defense counsel's knowledge of, and access to, evidence may be effectively nullified when a prosecutor misleads the defense into believing the evidence [does not exist or] will not be favorable to the defendant." *Pelullo*, 399 F.3d at 213. And the Eleventh Circuit has adhered to its rule described above, but acknowledged that *Banks* establishes that the result would be different if the "prosecution actively misled [the defendant] about the existence of the [evidence]." *Jennings*, 490 F.3d at 1239 n.8.

This Court should grant review to reaffirm, at least, that a defendant may rely on the prosecution's affirmative representations.

III. THIS CASE PRESENTS AN OPPORTUNITY TO CLARIFY THE RELATIONSHIP BETWEEN THE SCOPE OF DISCLOSURE OBLIGATIONS UNDER *BRADY* AND THE STANDARDS FOR EXCUSING PROCEDURAL DEFAULT

In the course of resolving this case, this Court could also clear up a fundamental and pervasive misunderstanding in the lower courts about the relationship between the substantive scope of *Brady*

and the standards for excusing procedural default on federal habeas review.

Properly understood, *Brady* imposes an uncompromising obligation on prosecutors to turn over all exculpatory or impeachment information in their possession. The defendant's own knowledge is irrelevant to the scope of that duty. This Court has never countenanced an exception to "the prosecution's broad duty of disclosure," *Strickler*, 527 U.S. at 281, for evidence that could reasonably be unearthed elsewhere, and has expressly stated that "[a] rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process," *Banks*, 540 U.S. at 696.

The question of the defendant's own knowledge or diligence in investigating was raised in *Strickler* under the rubric of the habeas requirement that a defendant must show "cause" and "prejudice" to excuse a procedural default. This Court observed that if *Brady* material was wrongly suppressed by the State and there is a reasonable probability that the result of the trial would have been different absent that suppression (*i.e.*, if the defendant proves a *Brady* violation), then the cause-and-prejudice standard would be satisfied as well. In a habeas case like *Strickler*, the cause-and-prejudice inquiry largely collapses into the substantive requirements of *Brady*. But, critically, *the reverse is not true* in cases arising on direct review or not involving any procedural default. The lower courts have wrongly conflated "suppression" under *Brady* with "cause" in habeas cases to hold that there is no substantive obligation under *Brady* to disclose exculpatory material if the defendant would not have

"cause" for failing to discover the *Brady* violation himself. In other words, suppression under *Brady* is sufficient to establish cause in habeas cases, but the lower courts have taken an unwarranted leap and assumed the inverse—that good "cause" under the habeas test is necessary to show suppression under *Brady*. There is no basis for that leap at all.

The debate over the question this Court reserved in *Strickler* should be confined to habeas cases, and conducted within the framework of the general cause-and-prejudice precedents. The lower courts have completely lost that distinction, with the result that defendants raising *Brady* claims on direct review (or that were not procedurally defaulted in state court) are now wrongly being denied relief because they cannot show "cause" for failing to discover the suppressed information themselves. *E.g.*, *United States v. Coker*, 514 F.3d 562, 570 (6th Cir. 2008); *supra* 20-23. Although the distinction is not important to the result in this case, this Court could easily clarify the applicable principles in the course of resolving the issues presented here.

IV. THE BRADY VIOLATION WAS MATERIAL

Because the Sixth Circuit determined the prosecution did not violate *Brady* by failing to turn over the exculpatory evidence that was "publicly available," its materiality analysis was limited to the prosecutor's notes of his meeting with Davenport. This Court could simply correct the Sixth Circuit's error on the "suppression" issue and remand for a reweighing of materiality. But the lower courts would benefit from this Court's application of the *Brady* materiality

standard to another concrete set of facts, under which Bell is entitled to relief.

A defendant satisfies the materiality or prejudice prong of *Brady* by demonstrating a "'reasonable probability' of a different result." *Kyles*, 514 U.S. at 434. In this case, Davenport's credibility was crucial to the government's case. App-49a-54a. Indeed, Davenport's testimony provided the only evidence of premeditation for the first-degree murder charge. And the prosecution's other evidence, as it admitted, was weak. There were no eyewitnesses who could identify Bell as the shooter. The police never found a murder weapon. Laboratory results indicated that Bell "could" have recently fired a gun; bullets of the same type were found on Bell; and spent cartridges of the same type were found in his camp. *Id.* 6a. But despite allegedly shooting the victims at close range inside a tent, no blood was found on Bell's clothing. *Id.* 118a. As in *Kyles*, "[i]t is significant ... that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that [Bell] was the murderer." 514 U.S. at 451.

Considered cumulatively, the suppressed evidence could have strongly impeached Davenport's credibility and demonstrates a reasonable probability of a different result—at the very least on the first-degree murder conviction. *E.g.*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."); *Norton v. Spencer*, 351 F.3d 1, 9 (1st Cir. 2003) ("Confidence in the outcome is particularly

doubtful when the withheld evidence impeaches a witness whose 'testimony is ... essential to the conviction.'") (citation omitted), *cert. denied*, 542 U.S. 933 (2004).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN M. BELL, Petitioner-Appellant,

v.

RICKY BELL, WARDEN, Respondent-Appellee.

No. 04-5523

Argued: June 6, 2007
Decided and Filed: Jan. 4, 2008

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512 F.3d 223

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

GIBBONS, J., delivered the opinion of the court, in which BOGGS, C.J., BATCHELDER, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, JJ., joined. CLAY, J. (pp. 237–50), delivered a separate dissenting opinion, in which MARTIN, MOORE, COLE, and GILMAN, JJ., joined, with MOORE, J. (p. 250), also delivering a separate dissenting opinion, in which MARTIN, COLE, and CLAY, JJ., joined. DAUGHTREY, J. (p. 251), delivered a separate opinion dissenting in part and concurring in part.

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Petitioner-appellant Stephen Michael Bell[1] was convicted in Tennessee state court of one count of first degree murder and one count of second degree murder. After unsuccessfully pursuing relief in the Tennessee appellate courts, Bell sought a writ of *habeas corpus* in federal district court. The district court denied Bell's petition but issued a certificate of appealability as to Bell's claims that the prosecution in his case violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to turn over impeachment material and that he received ineffective assistance of counsel. Bell appealed, and a divided panel of our court reversed the district court as to Bell's *Brady* claim. *Bell v. Bell*, 460 F.3d 739 (6th Cir.2006). A majority of the active members of the court voted for rehearing *en banc*, vacating the original panel decision.

For the reasons below, we affirm the decision of the district court denying Bell *habeas* relief.

I.

The Tennessee Court of Criminal Appeals set forth the facts underlying Bell's conviction:

> The victims, Herman Harrison Wallace, a/k/a Mad Dog, and his wife, Jean Lynn Wallace, were street people who camped under the bridges along the Cumberland River. The defendant, Michael Bell, a/k/a Monk, a street person, camped between the Wallaces and Nashville's Riverfront Park.
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> Ronald Harrington, a street person, met the defendant on the railroad tracks near the camp sites on September 6, at approximately 3:00 p.m.

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[1] Because petitioner and respondent share the same last name, we refer to petitioner as "Bell" and respondent as "the Warden."

Defendant was shirtless, wearing Levi's, a pair of shoes or boots and had a gun in his hand. Chained to his belt, was a billfold similar to that carried by truck drivers. The gun was either a .32 or .38 caliber revolver. Defendant appeared to be under the influence and stated that he had been "coking[."] During this exchange the defendant asked Mr. and Mrs. Harrington to take care of his dog if anything happened to him.

Edward Stansbury, an admitted alcoholic, testified that he spent the night of September 5, 1986, with friends on the river. The next morning he left but returned to the camp of Gary Hedges in the afternoon. At approximately 4:30 p.m. they noticed a man come up a path with a shiny black dog on a leash. The leash was a choker chain with a leather belt. When the man got to within twenty feet he spoke identifying himself as "Monk" and inquiring if "Mad Dog" and Jean were home. He walked down to the Wallaces' tent and entered. Up to this point he, Stansbury, had no reason to commit to memory the man's clothing or facial features.

As Stansbury and Hedges continued to sit they heard the sounds of dogs fighting and people arguing in the Wallaces' camp, then they heard a muffled shot. Jean Wallace ran out of the tent screaming "He has killed my dog, he has killed my dog[."] She turned and re-entered the tent. Stansbury heard a distinctive gun shot and saw Jean Wallace backing out of the tent. As she cleared the entrance she fell and there were two more shots. He was sure he had seen the man fire the last shot. The man had been right behind Mrs. Wallace at the entrance. The man left the tent and

left the scene. As the man was leaving he attempted to reload his pistol.

Stansbury described the culprit as 6'2 or 6'1, lanky, wearing fairly new blue jeans, a black baseball cap over his eyes, a sleeveless Levi jacket and T-shirt. His arms were tattooed. He had a billfold with a chain which appeared attached to a belt loop.

At a line-up conducted near the crime scene in the fading evening light, Stansbury was hesitant to identify the man in the number two spot. He was certain as to the man's jeans and nearby dog. While testifying he said he was still confused about the man's beard; he thought the culprit had short dark hair, but everything else about the number two man, the defendant, "fit to a tee[."]

Robert Moore, a Metropolitan Police Department homicide officer, arrived at the Wallaces' camp. He viewed the body of Mrs. Wallace and was directed to four shell casings that were lying on the ground. The soil in the area was fairly loose and the shell casings, covered with a chalky gray substance, were on top of the soil. Upon closer examination he was able to detect the smell of gun powder.

Officer Moore was advised that Mr. Wallace had been moved to General Hospital and although he appeared to have been shot as many as three times, only one slug had been found at the hospital. The officers at the crime scene made an extensive search and were able to recover a slug from the bloody mattress within the tent where Mr. Wallace had lain when shot.

After talking with Hedges and Stansbury and getting a general description of the suspect, the officers broadcasted a pick-up. Other detectives took the defendant in[to] custody and returned him to an area near the crime scene. Due to the fading light in and around the camp sites and under the bridges, other officers were setting up a line-up of street type people in an open area nearby. Officer Moore explained that facial identification was not that strong at the crime scene, but clothing details and the overall characteristics of the participants were strong in the witnesses' minds.

Officer Mark Wynn and two other officers responded to a call that a man fitting the description of the suspect was believed to be in the area of Fessler's Lane and Hermitage Avenue. They observed the suspect sitting on the curb and drinking a beer. He had a dog with him. He was taken in[to] custody and found to have six unspent .38 caliber Special Winchester 158 grain bullets in his pants pockets, but no weapon was found. He was concerned about the dog so the officers agreed to transport the dog to the place of the line-up. (A picture of the dog wearing the choke chain and belt leash was shown the jury.)

Sergeant Tommy Jacobs testified that shortly after 5:30 p.m., September 6, 1986, he visited the camp site of the defendant and recovered eleven spent .38 caliber shell casings and a Winchester ammunition box that were lying on the ground. A holster was also recovered at the camp site. Later at the police station Sergeant Jacobs read the defendant his Miranda rights. When told he would be charged with murder, the defendant responded

that he had not shot anyone, had not shot a gun and had never shot a gun.

Officer Darryl Ryan performed a nitric acid test on the defendant's hands. The swabs were sent to the crime laboratory.

Officer Archie Spain was sent to General Hospital. He took possession of a .38 caliber slug that was laying beside Mr. Wallace's body in the emergency room.

The State introduced testimony from three laboratory technicians. The first technician had examined the defendant's clothing for blood stains but found none. The second technician, a criminalist, had examined the swabs from the defendant's hands for gunshot residue. This technician testified that "antimonium, barium and lead indicative of gunshot residue was found in significant concentrations on exhibit 5, hand swabs. These results indicate that the subject could have fired or handled a gun."

The third technician was a firearm examiner. He identified the two lead slugs filed earlier as exhibits as being fired from the same firearm. He had disassembled one of the live cartridges taken from the defendant's pockets to compare the lead to the other lead slugs. He was of the opinion the three were from the same manufacturer. The eleven spent shells taken from defendant's camp site were compared with the four spent shells recovered at the victims' camp site. Based upon his microscopic examination he was of the opinion they all had been fired from the same firearm.

The medical examiner testified in detail as to two gunshot wounds found upon Jean Wallace's

body. In his opinion either one of these would have caused her death. From his examination of Herman Wallace, he concluded that death was the result of a saddle pulmonary embolus, a blood clot caused by the gunshot wounds which occluded the artery to the lungs.

The State rested its case in chief. Defendant's motion for judgments of acquittal [was] overruled.

Defendant testified that on the morning of September 6, 1986, he went to Riverfront Park. There he met two men with whom he pooled his money for the purchase of a fifth of wine. He and one of the men moved about in that general area of town during which time the man mentioned having a .38 caliber pistol but needed shells. They went to Service Merchandise where this person purchased a box of cartridges upon signing the log and entering an identification number. They returned to Riverfront Park and then to defendant's camp site where defendant did target practice with the man's pistol. At noon he went to lunch and returned to the camp. The men were still at his camp. Later defendant walked to Lebanon Road and Fessler's Lane where he was arrested.

He acknowledged being brought back to the Riverfront Park. He testified that he did not know he was in a line-up. When shown a picture of the line-up he identified one participant as the man who purchased the shells that morning.

Defendant explained that his statement to Sergeant Jacobs of having never fired a gun had reference to a gun used to murder someone. He was unable to explain why he had first said his dog had been with him all day and changed to say the

dog was not with him all day. He denied shooting the Wallaces.

The State called Billy Joe Camden as a rebuttal witness. This was the man who had purchased the box of shells at Service Merchandise on lower Broadway. Camden made the purchase at the request of the defendant. While they were together the defendant did not have his dog with him. After the purchase of the ammunition they went their separate ways. He did not go to the defendant's camp site nor witness him fire a gun. He was taken from Riverfront Park for the line-up. Camden testified that he owned a .22 caliber rifle but never owned a .38 caliber pistol.

State v. Bell, No. 88-138-II, 1989 WL 86583, at *1–4 (Tenn.Crim.App. Aug. 4, 1989). After hearing closing arguments and deliberating, the jury returned verdicts of guilty on both murder counts against Bell. Bell was sentenced to life in prison for the first degree murder of Jean Lynn Wallace and received a consecutive twenty-year sentence for the second degree murder of Herman Harrison Wallace.

Also among the state's witnesses at Bell's trial was William Davenport, a convicted felon held with Bell in the Nashville jail during the period prior to Bell's trial. In September 1986, Davenport contacted the Davidson County District Attorney General's Office by letter, indicating that he had information about the Bell case. On October 13, 1986, Ronald Miller, the prosecutor assigned to Bell's case, met with Davenport. Notes taken by Miller during that meeting document Davenport's report that Bell admitted murdering the Wallaces. They also suggest that Davenport desired a transfer into a different facility, the "Red Building,"

and movement into a work release program. The notes also seem to refer to Davenport's parole eligibility status. In November 1986, following Miller's meeting with Davenport, the district attorney's office, through a separate attorney, elected not to prosecute four criminal counts pending against Davenport. Davenport received concurrent sentences on two remaining charges.

When called by the government at Bell's March 1987 trial, Davenport testified that Bell said that he shot Herman Wallace during the course of an argument in which Bell was inebriated or "messed up." According to Davenport, Bell said that he shot Jean Wallace because "she was there" and expressed no remorse for either killing. Bell's defense counsel, Ross Alderman, attacked Davenport's account on cross-examination, suggesting that Davenport was an incredible witness due to his criminal history and his prior Ku Klux Klan membership. During his closing argument, Alderman again challenged Davenport's veracity, emphasizing Davenport's criminal history and parole status. Miller attempted to undermine Alderman's implication that Davenport had an incentive to lie to the jury and denied that Davenport's decision to testify had anything to do with any promises from his office. He stated at closing, "Mr. Alderman would have you believe that [Davenport] wants an early parole through our office or through me. Well, I don't have any say-so with the Parole Board; they are going to let him go soon enough anyway. I have nothing to do with what they do in their own respective realms." Shortly after Bell's trial, however, Miller did send a letter to the Board of Pardons and Parole on Davenport's behalf requesting parole "at the

earliest possible date." Davenport was granted early parole in June 1987.

Following his conviction, Bell filed a direct appeal to the Tennessee Court of Criminal Appeals, raising a number of claims. The appeals court denied the appeal on all grounds on August 4, 1989, and the Tennessee Supreme Court denied Bell's petition for review on November 6, 1989. Bell then sought post-conviction relief in state court. On November 2, 1992, the trial court denied him relief, and the Tennessee Court of Criminal Appeals affirmed the trial court's denial on August 4, 1994. Bell sought permission to appeal to the Tennessee Supreme Court, but the state supreme court denied his appeal on January 3, 1995.

On June 12, 1995, Bell filed a *pro se* petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of Tennessee. The court transferred Bell's petition to the United States District Court for the Middle District of Tennessee. After the court denied Bell's motion for partial summary judgment on March 31, 1997, there was no further action in the case for more than a year, and, as a result, the court dismissed the case without prejudice on October 23, 1998. Bell moved to reopen the case, and the court granted the motion on June 2, 1999. In an amended petition, filed September 6, 2000, Bell alleged fourteen constitutional violations. Two of those claims are relevant to the matter before us. Bell argued that the prosecution violated the Fourteenth Amendment by withholding favorable evidence from him in contravention of *Brady*, thereby depriving him of due process. He further claimed a violation of his Sixth Amendment right to the effective assistance of counsel, alleging that his trial counsel were ineffective for

failing to investigate his history of alcoholism and mental illness and to place those issues before the jury as factors undermining the government's proof of premeditation. The government thereafter moved to dismiss the petition, and the district court granted that motion on April 26, 2002, as to nine of Bell's claims on procedural default grounds. As to the remainder of Bell's claims—including his *Brady* and ineffective assistance claims—the court decided that their resolution would require discovery.

The district court conducted an evidentiary hearing on January 22 and 27, 2004. On January 22, Bell introduced an expert report prepared by Dr. Pamela Mary Auble. Dr. Auble's report detailed Bell's lengthy history of alcohol and drug abuse and his mental health problems. The report concluded that Bell's intoxication or mental illness could have compromised his mental state at the time of the Wallace murder, thus eliminating his ability to engage in a premeditated killing. Alderman testified at the hearing that he did investigate Bell's mental health history and alcoholism but defended his decision not to pursue these issues as a possible defense tactic because Bell insisted upon his innocence and wanted Alderman to assert an identity defense, that is, that Bell was not the killer. In addition, Alderman represented that because Bell had been ruled competent to stand trial, he could not prevail on a theory of insanity. Finally, Alderman testified that, although he submitted a discovery request to the government prior to trial, he received no information concerning Davenport's communications with the prosecution or his criminal background. Nevertheless, Alderman acknowledged that he knew that Davenport was seeking early parole and that he

had been able to argue at closing that Davenport provided testimony in order to receive the benefit of early parole.

At the hearing's continuation on June 27, Miller testified. He conceded many of the facts related to his interactions with Davenport. However, Miller expressly denied promising Davenport anything in exchange for his testimony. In explaining his decision to submit a letter to the parole board on Davenport's behalf, Miller stated, "I didn't promise Davenport anything, and I didn't make any agreements with him, but he testified at trial against someone I thought was dangerous, and I felt that he would now be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison, whenever the parole board thought he would be eligible."

On March 26, 2004, the district court issued a written order denying all of Bell's remaining claims. As to Bell's *Brady* claim, the court ruled that Miller's letter to the parole board was created after trial and thus could not have been disclosed pretrial. The court determined that the prosecution should have turned over the materials tending to prove that Davenport was seeking favors from the government in exchange for his testimony but held that Bell had not shown that the omission of these documents deprived him of a fair trial. With respect to Bell's claim that his counsel was deficient, the court held that Alderman did adequately investigate Bell's history of substance abuse and blackouts and ordered a pretrial mental evaluation of Bell. Because Bell was found competent to stand trial and because Bell insisted on his innocence, Alderman pursued a defense based on identity. The district court concluded that this tactical decision was consistent

with Sixth Amendment standards. Bell appealed to this court after receiving a certificate of appealability from the district court on his *Brady* and Sixth Amendment claims.

On appeal, a divided panel of our court reversed, concluding that the prosecution unlawfully withheld evidence of a tacit agreement between Davenport and Miller, the notes documenting Miller's meeting with Davenport, and sentencing records from the separate criminal proceedings against Davenport. Concluding that there was a reasonable probability of a different result had these materials been properly disclosed, the panel granted relief on Bell's *Brady* claim. The panel affirmed the denial of Bell's ineffective assistance of counsel claim. The Warden successfully sought rehearing *en banc*, and the original panel decision was vacated.[2]

II.

A.

In assessing the correctness of the district court's decision on Bell's petition, we evaluate the district court's factual findings for clear error and review the

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[2] Judge Moore's dissenting opinion questions the justification for granting *en banc* review in this case, asserting that the case does not present a question of exceptional public importance but only a difference of opinion as to what facts permit the inference of a tacit agreement. As explained *infra* at note 6, it is precisely the panel majority's conclusion that the facts of this case permit such an inference that would create a new definition of *Brady* material and a new legal rule broadly applicable in federal criminal prosecutions as well as *habeas* proceedings. If the panel majority's opinion remained as binding precedent, the impact would be enormous. While ordinarily factual issues do not merit *en banc* rehearing, this one does.

district court's ultimate refusal to grant *habeas* relief *de novo*. *Combs v. Coyle*, 205 F.3d 269, 277 (6th Cir.2000). As to the standard applicable to any relevant state court rulings, Bell asserts that the highly deferential review standard set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214 (1996), does not apply to his claims because he filed his initial petition before the enactment of the statute. See *Williams v. Taylor*, 529 U.S. 362, 402, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Warden responds that the district court dismissed Bell's original petition without prejudice, and Bell's amended petition was filed after AEDPA's effective date. Therefore, argues the Warden, AEDPA applies.

The parties' dispute is immaterial. In the present case, AEDPA's applicability is relevant only to the extent that we must review a state court's ruling on Bell's claims. As explained *infra*, Bell failed to present either of his claims to the state courts, and there is, therefore, no state court decision on these issues for us to review. We accordingly apply *de novo* review to Bell's constitutional claims. *See Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir.2006).

B.

Bell seeks *habeas* relief on the ground that the prosecution failed to turn over impeachment materials relating to William Davenport, a government witness. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194. A

successful *Brady* claim requires a three-part showing: (1) that the evidence in question be favorable; (2) that the state suppressed the relevant evidence, either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice. *See Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).[3]

Bell's *Brady* claim because he failed to present it to the state courts prior to bringing his claim in federal court and his claim is now procedurally defaulted. For his part, Bell does not contest the Warden's representation that he did not assert a *Brady* violation in state court. Under both the pre-AEDPA and AEDPA regimes, Bell was required to exhaust the remedies available to him in Tennessee's courts prior to seeking relief in federal court. See 28 U.S. C. § 2254(b) (1994); 28 U.S. C. § 2254(b)(1)(A) (1996). Where a petitioner fails to exhaust his state remedies "and the court to which the petitioner would be required to present his claim in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is a procedural default for purposes of federal habeas. . . ." *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (emphasis added). Because Tennessee law limits an inmate to only one postconviction petition, Tenn. Code Ann. § 40-30-102(a), Bell is precluded from returning to state court to exhaust his *Brady* claim properly, and his claim is therefore procedurally defaulted. A *habeas* petitioner who defaults on his federal claims in state court is barred from bringing those claims in federal court unless he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. As the Supreme Court explained in *Banks v. Dretke*, the cause and prejudice standard tracks the last two elements of a *Brady* claim: suppression by the government and materiality. 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (citing *Strickler*, 527 U.S. at 282, 119 S.Ct. 1936). We therefore choose to focus our attention on the merits of Bell's claim with the understanding that our decision on the merits resolves any issues as to procedural default.

Bell cites three items that he contends constituted favorable impeachment evidence subject to disclosure under *Brady*. First, Bell points to notes Miller took during his October 1986 meeting with Davenport. Those notes reveal that Davenport sought consideration for his assistance in the proceedings against Bell. Second, Bell argues that the prosecution was obligated to turn over the sentencing records from the case against Davenport. Those records show that the district attorney decided not to prosecute Davenport on two charges of grand larceny and two charges of concealing stolen property. They also show that Davenport received concurrent sentences on two additional criminal charges. Third, Bell claims that Davenport and Miller had an implied agreement or understanding that Miller would seek early parole for Davenport in exchange for his inculpatory testimony against Bell. That agreement, Bell argues, was subject to disclosure pursuant to the Supreme Court's decision in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). We consider each of these items in light of the three-part test outlined above.

1.

The *Brady* rule applies to evidence that is exculpatory in nature as well as evidence that a defendant could use at trial to impeach a government witness. See *United States v. Bagley*, 473 U.S. 667, 676–77, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). As to the notes from Miller's October 1986 meeting with Davenport, we agree with the district court that the prosecution was under an obligation to turn those notes over to Bell prior to trial. The documents from that meeting include four notations of significance: (1) an indication that Davenport unilaterally contacted the

district attorney's office to provide assistance in the Bell case; (2) a note that Davenport "want[ed] to go to the Red Building"; (3) what appears to be an outline of Davenport's scheduled prison release dates; and (4) a reference to a work release program. Collectively, Miller's notes, though cryptic, confirm that Davenport sought out the district attorney's office and provide support for the claim that he requested preferential treatment—in the form of a facility transfer or work release—in return for his assistance. This information is proper impeachment material and should have been disclosed to Bell prior to trial. *See United States v. Risha*, 445 F.3d 298, 303 n. 5 (3d Cir.2006) ("There can be no dispute that the information in question is favorable to the defense because [a witness's] expectation of lenience in the state proceedings could have been used to impeach him."). The sentencing documents arising out of the proceedings against Davenport are also impeachment material, qualifying as evidence of his prior convictions, and should have been disclosed. *See Crivens v. Roth*, 172 F.3d 991, 998 (7th Cir.1999) ("We conclude, therefore, that the state did, as a matter of law, improperly withhold [witness's] criminal history record from [defendant].")

We take a different view, however, of Bell's assertion of a tacit agreement or "understanding" that was subject to disclosure under *Brady*. It is well established that an express agreement between the prosecution and a witness is possible impeachment material that must be turned over under *Brady*. *Giglio*, 405 U.S. at 154–55, 92 S.Ct. 763. The existence of a less formal, unwritten or tacit agreement is also subject to *Brady*'s disclosure mandate. *See*, e.g., *Wisehart v. Davis*, 408 F.3d 321, 323–24 (7th Cir.2005).

If Bell could prove that Davenport and Miller had reached a mutual understanding, albeit unspoken, that Davenport would provide testimony in exchange for the district attorney's intervention in the case against him, such an agreement would qualify as favorable impeachment material under *Brady*. On the record before us, however, we are unable to conclude that such an agreement existed here.

In support of his assertion of an implied agreement, Bell relies in part on the notes from Miller's discussion with Davenport on October 3, 1986. He argues, in addition, that the events following this meeting—specifically, the resolution of the case against Davenport—confirm the existence of an agreement between Davenport and Miller. The record confirms Bell's claim that Davenport contacted the district attorney's office in the hope of receiving a benefit in exchange for his assistance. Indeed, Miller testified at the evidentiary hearing before the district court that, although he was not certain what Davenport wanted, "[e]verybody wants something, and I'm sure Davenport wanted something."

The fact that Davenport desired favorable treatment in return for his testimony in Bell's case does not, standing alone, demonstrate the existence of an implied agreement with Miller. A witness's expectation of a future benefit is not determinative of the question of whether a tacit agreement subject to disclosure existed. *See id.* at 325 ("[W]hat one party might expect from another does not amount to an agreement between them."). Although Davenport may have been seeking more lenient treatment in his own case, we find no evidence of a corresponding assurance or promise from Miller. Miller testified at the

evidentiary hearing before the district court that he did not promise Davenport anything in exchange for his testimony, stating unequivocally that he "made no agreements with Mr. Davenport at all." When asked at his parole hearing about Miller's letter to the parole board and Davenport's participation in the Bell case, Davenport stated that he "got nothing out of that whatsoever."

Nor do we believe that the handling of Davenport's case after his meeting in October 1986 proves the existence of an understanding. As to the disposition of the six counts pending against Davenport, Bell does not direct us to any reliable evidence that the prosecutor or judge assigned to Davenport's case had any awareness that Davenport was planning to render assistance in the Bell case.[4] Without evidence to the contrary, one could just as reasonably conclude that the result in Davenport's case merely reflects the standard operations of the criminal justice system, in which the state offers leniency to defendants in exchange for their pleas of guilty. *Cf. Wisehart*, 408 F.3d at 324 ("[M]ost criminal cases are disposed of pursuant to plea agreements that involve concessions on [the government's] part."). Moreover, Bell relies too heavily upon Miller's subsequent decision to transmit a letter to the parole board. In his letter, Miller mentions Davenport's cooperation in the case against Bell, but also notes the threat of possible retaliation by

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[4] Bell notes in his brief that the attorney prosecuting Davenport's case, Katie Novak, "later became Miller's wife," implying that Novak was somehow complicit in the purported arrangement between Davenport and Miller. Bell's bare suggestion is not enough to convince us that this was the case, however.

other prisoners as a reason for granting Davenport early parole. In light of Miller's sworn statement before the district court that he had no agreement with Davenport, we have no reason to believe that an undisclosed agreement was the true reason for Miller's letter to the parole board.

In sum, although we do not take issue with the principle that the prosecution must disclose a tacit agreement between the prosecution and a witness, it is not the case that, if the government chooses to provide assistance to a witness following a trial, a court must necessarily infer a preexisting deal subject to disclosure under *Brady*." The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony." *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir.2003) (emphasis in original). To conclude otherwise would place prosecutors in the untenable position of being obligated to disclose information prior to trial that may not be available to them or to forgo the award of favorable treatment to a participating witness for fear that they will be accused of withholding evidence of an agreement.

Bell has not adequately demonstrated the existence of an understanding between Davenport and Miller concerning his testimony at Bell's trial. "Without an agreement, no evidence was suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation." *Todd v.*

Schomig, 283 F.3d 842, 849 (7th Cir.2002).[5] The result advocated by Judge Clay in his dissenting opinion would create a new definition of *Brady* material that includes possible post-trial witness favorable treatment—something never previously considered by any court to be within *Brady*'s ambit.[6]

2.

We next consider whether a *Brady* violation occurred because the prosecution did not disclose the favorable evidence-the sentencing records and the notes from Miller's 1987 meeting. With respect to the sentencing records, the Warden argues that those records were publicly available and that Bell could have obtained access to them.

The Warden is correct that the sentencing records were available to Bell. Moreover, because Davenport's testimony derived from statements Bell made to him while they were in jail together, Bell easily could have pursued any pending charges against Davenport and their disposition. In fact, Davenport mentioned a pending charge as a reason for his incarceration during his testimony. Under such circumstances, our court

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[5] Bell also argues that Miller's letter to the parole board was *Brady* material. However, as the district court correctly observed, Miller drafted that letter after Bell's trial and could not have disclosed it pretrial. The letter is useful to Bell only as evidence of a possible agreement between Davenport and Miller concerning Davenport's testimony. For the reasons set forth above, we do not believe that the materials Bell cites, including the letter, amount to proof of an understanding, implied or otherwise.

[6] Such an expansion of the definition of *Brady* has legal implications as well as factual ones. And because prosecutors so frequently use cooperating witnesses in criminal trials, the practical effect of such a definition is great.

has made clear that a *Brady* violation does not occur. *See Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir.2007) ("Where, like here, 'the factual basis' for a claim is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense.") (citation omitted); *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir.1998) (There is no *Brady* violation where information is available to the defense "because in such cases there is really nothing for the government to disclose.").

The dissent faults the majority's reliance on our case law regarding withheld information that is readily available to the defense from another source. Instead, it says that this issue is controlled by two Supreme Court cases: *Strickler* and *Banks*. The dissent reasons that *Strickler* and *Banks* compel the conclusion that a *Brady* violation occurred because the prosecutor in this case represented to Bell's counsel that he had turned over all discoverable information in his file.

In our view, *Strickler* and *Banks* do not call our precedents into question and do not counsel a conclusion that there was a *Brady* violation with respect to the nondisclosure of the sentencing records. Neither case involves information remotely similar to the public sentencing records not given to the defense in this case. Rather, both involve information known to investigating officers that defendants had no reason to know about and that could not have been discovered by defendants without an extensive and possibly fruitless investigation. In *Strickler*, the withheld information consisted of notes taken by a detective during interviews with a key witness and letters from the witness to the detective. 527 U.S. at 266 & 273–75, 119 S.Ct. 1936. In *Banks*, the undisclosed evidence

included the status of one witness as a paid police informant who had provided information about the defendant's involvement in the case and interviews that police and prosecutors conducted with another witness who denied in his testimony that he had spoken to anyone about his testimony. 540 U.S. at 675–76, 124 S.Ct. 1256. Given these facts, the Supreme Court readily concluded that Strickler and Banks had shown cause for failing to present their *Brady* claims in state court because they had reasonably relied on the prosecutor's open file policy and assertions during state proceedings that everything known to the government had been disclosed.[7] *Strickler*, 527 U.S. at 289, 119 S.Ct. 1936; *Banks*, 540 U.S. at 698, 124 S.Ct. 1256.

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[7] As previously mentioned, the Supreme Court observed in *Banks* that the cause and prejudice standard tracks the last two elements of a *Brady* claim: suppression by the government and materiality. 540 U.S. at 691, 124 S.Ct. 1256 (citing *Strickler*, 527 U.S. at 282, 119 S.Ct. 1936). The cause analysis adopted by the Court includes examination of whether a defendant reasonably relied on the government's representation. *Id.* at 692, 124 S.Ct. 1256 (citation omitted). Similarly, analysis of whether material was suppressed by the government involves consideration of reasonable reliance. *Id.* at 698, 124 S.Ct. 1256. *Cf. Jennings v. McDonough*, 490 F.3d 1230, 1238–39 (11th Cir.2007) ("[T]here was no suppression of [a] tape" where defendant had knowledge of a witness and "had within his knowledge information by which he could have ascertained her statement."); *Gantt v. Roe*, 389 F.3d 908, 913 (9th Cir.2004) ("Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation.") The terminology provides opportunity for confusion, however, because the government's withholding of evidence does not necessarily mean that it has suppressed the evidence for purposes of ascertaining whether a *Brady* violation has occurred. And whether a *Brady* violation is ultimately found is not determinative of the extent of the prosecutor's broad duty

By contrast, in this case the known fact of Davenport's incarceration strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file, and the information was a matter of public record. *See Matthews*, 486 F.3d at 890–91 (concluding that witness's withdrawal of original guilty plea, plea to reduced charges, and resentencing were public information and that government could not have "disclosed" information "readily available to the defense"); *Spirko v. Mitchell*, 368 F.3d 603, 611(6th Cir.2004) (holding that where evidence is available from sources other than the state and defendant was "aware of the essential facts necessary for him to obtain that evidence," the *Brady* rule does not apply).

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to disclose exculpatory evidence. The Court itself recognized in *Strickler* the differing uses of the terms:

> This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

527 U.S. at 281–82, 119 S.Ct. 1936. In this opinion we use the term "*Brady* violation" in the strict sense of the term. Thus, saying that a particular nondisclosure was not a *Brady* violation in no way suggests that the prosecutor did not have a duty to disclose the information.

The absence of reasonable reliance distinguishes this case from *Strickler* and *Banks*.

3.

Turning to the notes from Miller's 1987 meeting with Davenport, which were not otherwise available to Bell, we examine whether the failure to disclose those notes amounted to constitutional error. The Supreme Court has held that error of constitutional magnitude occurs only when the production of the evidence would have created a "reasonable probability" of a different result. *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375. As the Court noted in *Kyles v. Whitley*:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375). Thus, if Bell can show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," he will prevail. *Id.* at 435, 115 S.Ct. 1555.

Without question, Miller's notes would have provided support for the defense theory that Davenport expected some benefit in return for his testimony against Bell and was therefore not a credible witness. Despite the absence of the notes, however,

Alderman did challenge the purity of Davenport's motives during his closing argument, stating:

> [Y]ou have got to decide whether you want to believe somebody who was on parole, violated that parole, was in jail, all this involving a crime involving fraud and false dealings, theft—. . . . I [Davenport] want you to believe [my testimony] . . . because I have got a parole hearing coming up in a matter of months and if I can go to the Parole Board and I can say, 'I have helped convict Stephen Michael Bell,' that they might cut me some slack because they violated my last parole when I committed another crime. . . . That is why I called the District Attorney's office; that is why I spoke to the police and the District Attorney and that is why I came to testify, but you believe me.

The notes from Davenport's meeting with Miller could have bolstered Bell's credibility attack on Davenport's motives, but any assistance would have been modest. The jury was apprised of Davenport's status and the possible other reasons for his decision to testify, namely, that he wished to secure early parole as a result of his participation in the Bell case. Documentation would not have permitted the development of alternate theories or different lines of argument. Thus, the inclusion of the withheld material could not "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555.

We conclude, therefore, that Miller's notes from his meeting with Davenport were not material, and the district court correctly denied relief on Bell's *Brady* claim.

C.

Bell also claims that his trial counsel rendered ineffective assistance of counsel. Because we agree with the original panel's resolution of this issue, affirming the district court's denial of relief on Bell's claim, we reinstate the original panel decision as to that claim. *See Getsy v. Mitchell*, 495 F.3d 295, 315 (6th Cir.2007); *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 270 (6th Cir.1998).

III.

For the foregoing reasons, we affirm the judgment of the district court denying Bell's claim for *habeas* relief.

CLAY, Circuit Judge, dissenting.

In its effort to avoid the conclusion that the state violated *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the majority makes three basic missteps. First, the majority disregards the reasoning of the Supreme Court and blames Petitioner for refusing to discover evidence the prosecution said did not exist. Second, the majority ignores the weight of the evidence and the absence of findings by the district court, and instead holds that no tacit agreement existed between William Davenport and the prosecution. Finally, the majority concludes that the prosecution's withholding of evidence was not prejudicial, thereby implying that because Petitioner made an impeaching argument, it was irrelevant that he was deprived of the evidence to support it. I disagree with the majority on all three points, and therefore respectfully dissent.

I.

The facts recounted by the majority and the Tennessee Court of Appeals are generally correct.

Rather than repeat a lengthy recitation of the facts, I will limit this discussion to those aspects insufficiently developed by the majority.

Petitioner's trial was held on or about the beginning of March, 1987. At trial, the prosecutor, Ronald Miller, called Davenport as a witness against Petitioner. Davenport claimed that Petitioner approached him in jail and asked what "they would do on a double murder." J.A. at 256. Petitioner allegedly proceeded to discuss the charges in detail, recounting that he had gotten into an argument over his dog with Herman Wallace. Davenport stated that Petitioner admitted that he had been intoxicated, and had ended up shooting Mr. Wallace. Petitioner also allegedly confessed to shooting Jean Wallace, who was Mr. Wallace's wife, because "she was there." J.A. at 257. Davenport testified that Petitioner did not seem remorseful about killing the two people.

On cross-examination, Petitioner brought out Davenport's five felony convictions for charges including forgery, fraud, and receiving and concealing stolen property. Davenport admitted that he was familiar with the criminal justice system, that he was currently incarcerated, and that he had a parole hearing on December 5, 1987. Davenport also admitted that he at one time adhered to the beliefs of the Ku Klux Klan.

During closing, Petitioner argued that Davenport lacked credibility because of his convictions for crimes involving fraud and false dealings, and because of his membership in the Klan. He also contended that Davenport should not be believed because Davenport had

> a parole hearing coming up in a matter of months and if [he] can go to the Parole Board and [he] can say, "I have helped to convict Stephen Michael Bell," that they might cut [him] some slack. . . . That is why [he] called the District Attorney's office; that is why [he] spoke to the police and the District Attorney and that is why [he] came to testify.

J.A. at 275.

Miller argued in favor of Davenport's credibility during closing. According to Miller, Davenport testified because Petitioner "came there and told him what had happened and he had no remorse and no sorrow whatsoever and that is why he [Davenport] was in here testifying and telling you what he heard." J.A. at 277. Miller also claimed that though "[Petitioner] would have you believe that [Davenport] wants an early parole through our office or through me," Miller did not "have any say-so with the Parole Board; they are going to let him go soon enough anyway. I have nothing to do with what they do in their own respective realms." J.A. at 277. The jury convicted Petitioner for the first-degree murder of Mrs. Wallace, and the second-degree murder of Mr. Wallace.

On March 19, 1987, approximately two weeks after Petitioner's trial, Miller sent a letter to the Board of Pardons and Paroles requesting that Davenport "be considered for parole at the earliest eligible date." J.A. at 501. Miller stated that "the State did not have a strong case without the testimony of William Davenport" and that "[p]rior to talking to Mr. Davenport, we did not have any idea as to the motive for the killings." J.A. at 501. According to Miller, early parole was justified on account of Davenport's

cooperation and the possibility of retaliation from other prisoners. In June of 1987, the Board granted Davenport parole, apparently in advance of his release eligibility date.[1]

After pursing a direct appeal and state post-conviction relief, Petitioner brought a petition for a writ of habeas corpus. The district court concluded that an evidentiary hearing was necessary to resolve certain issues raised by Petitioner, including the *Brady* issue. The court accordingly held an evidentiary hearing in January of 2004.

At the evidentiary hearing, Miller's testimony revealed that Davenport had initiated contact with the prosecution by sending a letter to the district attorney that was eventually passed on to Miller.[2] Miller had met with Davenport on October 3, 1986, after receiving Davenport's letter. Miller's notes from that meeting (the "Notes") indicate that Davenport "want[ed] to go to [the] Red Building," which was a preferred minimum security facility, and that he was interested in work release. The Notes also suggest a discussion of Davenport's prior convictions, as well as the date that Davenport would be eligible for parole.

Though Miller could not remember many of the specifics of his conversation with Davenport, he acknowledged that Davenport wanted something in

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[1] The record is unclear as to when exactly Davenport was eligible for parole. At Petitioner's trial, Davenport testified that his parole eligibility date was December 5, 1987. A handwritten note on a copy of the letter written by Miller suggests a parole eligibility date of November 25, 1987.

[2] This letter is not in the record, and counsel for Petitioner stated at oral argument that the letter disappeared while in possession of the state, and has never been disclosed to Petitioner.

exchange for his testimony. Miller denied, however, making any agreements with Davenport. Miller stated that he wrote the letter to the parole board on behalf of Davenport because "he testified at trial against someone I thought was dangerous, and I felt that he would now be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison." J.A. at 475. Though Miller stated that the case against Petitioner would have proceeded to trial without Davenport's testimony, Miller reaffirmed that the state did not have a good case without Davenport.

Ross Alderman, Petitioner's trial attorney, also testified at the evidentiary hearing. His testimony revealed that, although documents reflecting the disposition of Davenport's criminal charges were responsive to Petitioner's *Brady* request, the prosecution did not provide Petitioner any documents concerning Davenport.[3] Instead, the prosecution claimed that it had provided Petitioner with "all discoverable information in [its] file." J.A. at 499. Sometime after trial, Petitioner discovered that the same prosecuting office handling Petitioner's case had *nolle prosequied* four pending criminal charges against Davenport, which consisted of two counts of grand larceny and two counts of concealing stolen property, after Davenport's meeting with Miller but before his testimony at Petitioner's trial. On the same date that the charges were *nolle prosequied*, Davenport pled guilty to writing worthless checks and concealing

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[3] Specifically, Petitioner asked for "[t]he nature and substance of any preferential treatment given at any time by any state agent, whether or not in connection to this case to any potential witness" and "[t]he FBI and state arrest and conviction records of each witness the state intends to call in this matter." J. A. at 441.

stolen property, and received prison time to be served concurrently with time he was already serving.

In his post-hearing brief, Petitioner argued that Miller's interactions with Davenport demonstrated an exchange of favorable treatment for testimony that should have been disclosed to Petitioner. This exchange, Petitioner contended, when combined with the evidence of the Notes and Davenport's *nolle prosequied* charges, entitled Petitioner to relief under *Brady*. The district court rejected Petitioner's *Brady* claim. The court concluded that Miller's letter to the parole board did not exist at the time of trial and could not be disclosed, and though the Notes should have been turned over to Petitioner, they were not material under *Brady*. The district court made no findings as to whether a tacit agreement existed between Davenport and Miller, and also failed to analyze Davenport's *nolle prosequied* charges.

A panel of this Court reversed, holding that the evidence of a tacit agreement, the Notes, and Davenport's *nolle prosequied* charges was improperly suppressed under *Brady*. *Bell v. Bell*, 460 F.3d 739, 750–57 (6th Cir.2006). The Court also concluded that this evidence was material, and therefore Petitioner was entitled to relief under *Brady*. *Id.* at 757–59. Respondent moved for rehearing *en banc*, which this Court granted on December 15, 2006, thereby vacating the panel opinion.

II.

The sole issue is whether Petitioner established a *Brady* violation. I agree with the majority that we review this issue *de novo*, and that the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-132,

110 Stat. 1214 (1996), does not constrain our review. Majority Op. at 231.

A.

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194. To prevail on a *Brady* claim, a petitioner must establish three elements: (1) "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Exculpatory and impeaching evidence are measured by the same constitutional standard. *United States v. Bagley*, 473 U.S. 667, 676–77, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Brady represents a limited departure from our adversarial system, which is justified by the overarching concern that the defendant receives a fair trial. *Id.* at 675 & n. 6, 105 S.Ct. 3375. The Brady rule recognizes that the state's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439, 115 S.Ct. 1555, 131 L.Ed. 2d490 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)); *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936 (noting the "special role played by the American prosecutor in the search for truth in criminal trials"). Requiring the prosecutor to disclose favorable

evidence "tend[s] to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 439, 115 S.Ct. 1555.

B.

There is no dispute that both the Notes and the prosecutor's decision to *nolle prosequi* several of Davenport's pending criminal charges constituted favorable impeaching evidence. Likewise, there is no dispute that the prosecution suppressed the Notes. The majority argues, however, that because evidence reflecting the disposition of Davenport's criminal charges was available to Petitioner in the public records, the prosecution did not suppress such evidence. For this reason, the majority refuses to consider the disposition of Davenport's pending criminal charges in its materiality analysis. The majority's holding is erroneous as a matter of law, and it threatens to reintroduce the gamesmanship that *Brady* and its progeny were designed to prevent. Petitioner specifically requested im-peaching evidence concerning the criminal arrests and convictions of the prosecution's witnesses, which would have included the disposition of Davenport's criminal charges. The prosecution responded to that request without alerting Petitioner to the existence of these documents, claiming instead that all discoverable documents had been disclosed, despite the fact that the documents were in the prosecution's possession. Accordingly, the prosecution suppressed this evidence, notwithstanding its availability to Petitioner through the public records.

Two Supreme Court cases establish that a prosecutor's false or misleading statement disclaiming

the existence of *Brady* material obviates the need for a petitioner to conduct an independent investigation. Such material, if in the prosecution's possession, and if not disclosed, is therefore suppressed under *Brady*, even if it is available through another source. In *Strickler*, the issue before the Court was whether the petitioner had "cause" for failing to raise his *Brady* claim before the state trial court, 527 U.S. at 283, 119 S.Ct. 1936, which, as the Supreme Court has explained, tracks *Brady*'s "suppression" element. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The warden argued that because facts suggesting the basis for the petitioner's *Brady* claim were publicly available, through trial testimony and a newspaper article, the prosecution's maintenance of an open-file policy that did not include the evidence in question was irrelevant. *Strickler*, 527 U.S. at 284, 119 S.Ct. 1936. The Supreme Court rejected this argument. Though the Court disagreed with the warden's contention that the factual basis for the petitioner's claim was publicly available, it did not rely on this fact in crafting the applicable legal standard.[4] *Id.* at 285, 119 S.Ct. 1936. Instead, the Court held that the petitioner established cause because (1) "the prosecution withheld exculpatory evidence," (2) "petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose

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[4] The Supreme Court declined to reach the question of whether a different result would follow if "the defendant [were] aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Strickler*, 527 U.S. at 288 n. 33, 119 S.Ct. 1936. This question is not raised by the instant case, because Petitioner was not aware of the existence of Davenport's *nolle prosequied* charges.

such evidence," and (3) the state asserted that petitioner had received "everything known to the government." *Id.* at 289, 119 S.Ct. 1936.

In *Banks*, the Supreme Court reaffirmed and extended *Strickler*, and reversed the Fifth Circuit's holding that the petitioner could not demonstrate cause because he was not diligent in investigating his *Brady* claim. 540 U.S. at 695, 124 S.Ct. 1256. The *Banks* Court did not take a position on whether further investigation would have led to the suppressed material; instead, the Court found cause because the prosecution (1) "knew of, but kept back" the *Brady* material; (2) "asserted . . . that it would disclose all *Brady* material;" and (3) confirmed the petitioner's reliance on that representation by denying contrary allegations in state habeas proceedings. *Id.* at 693, 124 S.Ct. 1256. In rejecting the warden's argument, Banks clearly indicated that a contrary rule "declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696, 124 S.Ct. 1256 (framing the state's argument that the petitioner was not diligent as an argument that "the prosecution can lie and conceal and the prisoner still has the burden to discover the evidence" and rejecting this argument (alternation and internal citation removed)); *see also id.* at 695, 124 S.Ct. 1256 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."). The rule emerging from *Strickler* and *Banks* is clear: Where the prosecution makes an affirmative representation that no *Brady* material exists, but it in fact has *Brady* material in its possession, the petitioner

will not be penalized for failing to discover that material.

The majority's attempt to distinguish this case from *Strickler* and *Banks* on the basis of "absence of reasonable reliance" is utterly unpersuasive. Majority Op. at 236. Petitioner specifically requested that the prosecution provide impeaching evidence concerning its witnesses, which would have included Davenport's sentencing documents. Accordingly, when the prosecution did not provide any of those sentencing documents and informed Petitioner that it had provided "all discoverable information in [its] file," J.A. at 499, Petitioner was entitled to "presume that [these] public officials [had] properly discharged their official duties" and that no relevant documents existed. *Banks*, 540 U.S. at 696, 124 S.Ct. 1256 (quoting *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997)). Under *Strickler* and *Banks*, Petitioner's ability to uncover the disposition of Davenport's criminal charges by searching public records did not relieve the prosecution of its duty to respond honestly and completely to Petitioner's discovery request.

The majority's mischaracterization of *Strickler* and *Banks* is even more egregious in light of the courts of appeals' consistent interpretation of these cases. Several of our sister circuits have recognized that prosecutors cannot knowingly misrepresent that *Brady* material does not exist without running afoul of *Banks* and *Strickler*, *see Jennings v. McDonough*, 490 F.3d 1230, 1239 & n. 8 (11th Cir.2007) (denying *Brady* claim where the petitioner had equal access to the evidence and "there is no allegation that the prosecution actively misled [the petitioner] about the existence of the

[*Brady* evidence]"); *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir.2004) ("[I]f the State failed under a duty to disclose the evidence then its location in the public record, in another defendant's file, is immaterial."); *Gantt v. Roe*, 389 F.3d 908, 912–13 (9th Cir.2004) ("While the defense could have been more diligent ... this does not absolve the prosecution of its *Brady* responsibilities.... Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation."), as have several separate opinions of this Court. *See United States v. Graham*, 484 F.3d 413, 422 (6th Cir.2007) (Batchelder, J. dissenting) ("[T]he defense is entitled to rely on the prosecution's representations regarding its compliance with its *Brady* obligations."); *Beil*, 460 F.3d at 767 (panel opinion) (Gibbons, J. dissenting) ("Miller ... did not disclose ... Davenport's sentencing documents,... which could have been used for impeachment. Thus, the failure to disclose them was contrary to the requirements of *Brady* and its progeny.");[5] *cf. Harbison v. Bell*, 408 F.3d 823, 833 (6th Cir.2005) (distinguishing *Banks* because there "the prosecution had repeatedly asserted that all *Brady* material was disclosed, but nevertheless continued to conceal such material"); *Puertas v. Overton*, 168 Fed.Appx. 689, 706 (6th Cir.2006) (unpublished) ("The

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[5] The authoring judge of the majority opinion originally believed that Davenport's sentencing documents were suppressed by the prosecution, as indicated by her now-vacated panel dissent. She now argues in the majority opinion herein that the sentencing documents were not suppressed by the prosecution. The fact that the judge authoring the majority opinion herein has taken contradictory positions on this issue certainly detracts from the persuasiveness of the majority opinion.

Supreme Court has repeatedly held that a defendant can reasonably rely on the prosecution's representation that it has disclosed all *Brady* evidence, and that once the prosecution confirms this representation, the defendant is under no further duty to investigate additional *Brady* materials.").

As the majority notes, *Matthews v. Ishee* held that "[w]here . . . 'the factual basis for a claim' is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense," even though the government had misled the petitioner by assuring the jury that the material in question did not exist. 486 F.3d 883, 891 (6th Cir.2007) (quoting *Strickler*, 527 U.S. at 283 n. 24, 119 S.Ct. 1936). We are not, however, presently bound by *Matthews*. Because an examination of *Matthews* reveals that it misconstrues *Banks* and *Strickler*, we should decline to follow it.

First, *Matthews* misreads the portion of *Strickler* that purportedly supports its conclusion. *Strickler* asserted that the prosecution's open-file policy and refusal to disclose *Brady* material were factors that established "cause" under *Murray v. Carrier*, 477 U.S. 478, 488 (1986), because they constituted "conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim." *Strickler*, 527 U.S. at 283, 119 S.Ct. 1936. In support of this proposition, *Strickler* quoted *Murray*: "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel *or* that some interference by officials made compliance impracticable, would constitute cause under this standard." *Id.* at 283 n. 24, 119 S.Ct. 1936 (emphasis added) (internal citations and quotation marks omitted)

(quoting *Murray*, 477 U.S. at 488, 106 S.Ct. 2639). Clearly *Strickler* was quoting *Murray* to establish that "interference by officials" constituted cause—as discussed above, *Strickler* did not attach legal relevance to the petitioner's potential inability to discover the *Brady* material by following up on the public documents. *Matthews*, however, quotes only the "not reasonably available" example of cause highlighted by *Murray*, while ignoring the "interference by officials" example actually at issue in *Strickler*. *See* 486 F.3d at 891.

Furthermore, *Matthews*' analysis is flawed because it draws a distinction between "cases when the government has sole possession of investigative notes or memoranda" and cases based on public information, *id.* at 890–91, notwithstanding *Strickler*'s and *Banks*' implicit rejection of this distinction. In *Banks*, the Court disregarded the warden's argument that the factual basis for the petitioner's claim was available from other sources, *see Banks*, 540 U.S. at 694–96, 124 S.Ct. 1256; likewise, in *Strickler*, the Court declined to condition its test on the petitioner's inability to locate the *Brady* material. Instead, the Court crafted a legal rule that focused on whether the prosecutor made false or misleading representations concerning information in its possession. *Strickler*, 527 U.S. at 289, 119 S.Ct. 1936; *Banks*, 540 U.S. at 693, 124 S.Ct. 1256.

Finally, *Matthews* is inconsistent with the policies that *Brady* and its progeny are intended to promote. Forbidding prosecutors from making false representations concerning information within their possession furthers *Brady*'s goal of fair trials, and is consistent with the " 'special role played by the American prosecutor in the search for truth in criminal

trials.' " *Banks*, 540 U.S. at 696, 124 S.Ct. 1256 (quoting *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936). The contrary rule is antithetical to both of these concerns. The *Matthews* rule also encourages the type of unsavory gamesmanship that the Supreme Court has thought unfit for litigation that stakes the defendant's liberty on the jury verdict. *See id.* ("Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation."(citing *Kyles*, 514 U.S. at 440, 115 S.Ct. 1555)).[6]

In this case, Miller represented that there was no discoverable information in his file relating to Davenport. This representation was false or misleading, as his office was in possession of Davenport's sentencing documents. Accordingly, the prosecution suppressed the evidence of its decision to *nolle prosequi* several of Davenport's pending criminal charges.

C.

In *Giglio v. United States*, the Court held that *Brady* required the disclosure of an agreement between the prosecution and its witness. 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). This rule requires the disclosure of "promises of reward" and "inducements" offered to witnesses. *Bagley*, 473 U.S. at 683–84, 105 S.Ct. 3375. The Supreme Court has specifically held that making a promise of reward or inducement contingent on the prosecution's satisfaction does not exempt it from disclosure. *See id.* But beyond this general parameter, the Court has provided little

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[6] The majority also relies on *Spirko v. Mitchell*, 368 F.3d 603, 611 (6th Cir.2004), but that case is inapposite because it did not involve a false or misleading statement made by the prosecution.

guidance on how broadly or narrowly "promises of reward" or "inducements" should be construed, and no specific instructions on how *Giglio* applies to tacit agreements.

The majority, like several of our sister circuits, does not take issue with the general principle that tacit agreements, like explicit agreements, must be disclosed under *Giglio*. *See, e.g.*,*Wisehart v. Davis*, 408 F.3d 321, 323 (7th Cir.2005) (holding that the witness could be impeached by a "tacit understanding that if his testimony [were] helpful to the prosecution, the state would give him a break on some pending criminal charge"); *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir.1986) ("[F]acts which imply an agreement ... bear on [the witness's] credibility and would have to be disclosed"); *cf. Giglio*, 405 U.S. at 153 n. 4, 92 S.Ct. 763 (suggesting that disclosure is required where the United States Attorney's affidavit "contains at least an implication that the Government would reward the cooperation of the witness," which "tend[ed] to confirm rather than refute the existence of some understanding for leniency"). Reading *Giglio* and *Bagley* to require prosecutors to disclose tacit agreements is undoubtedly the correct result, as the same policies justifying the disclosure of explicit agreements also compel the disclosure of tacit agreements. Like explicit agreements, tacit agreements are likely to be relevant to credibility, and therefore should be disclosed to the jury. *See Giglio*, 405 U.S. at 155, 92 S.Ct. 763. Indeed, tacit agreements may be *more* likely to skew the witness's testimony. In the case of an explicit agreement, the testifying witness will know what he can expect to receive in exchange for his testimony, and will know the conditions he must fulfill. When a

witness is instead led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the greater the reward. *See* R. Michael Cassidy, *"Soft Words of Hope:"* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U.L.Rev. 1129, 1154 (2004) ("The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best."); *cf. Bagley*, 473 U.S. at 683, 105 S.Ct. 3375 ("The fact that the [witnesses'] stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.").[7]

The threat of incorrect jury verdicts is further increased by tacit agreements because, when testifying, a witness whose agreement is tacit, rather than explicit, can state that he has not received any promises or benefits in exchange for his testimony. By definition, tacit agreements are not concrete or explicit. *See* Blacks Law Dictionary 325, 1465 (7th ed.1999) (defining "tacit" as "[i]mplied but not actually

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[7] Empirical evidence also supports the conclusion that implicit promises are as likely to skew a witness's testimony as explicit promises. *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 Law & Hum. Behav. 233, 248 (1991) ("In short, . . . our data indicate that because people often process information 'between the lines', [explicit and implicit promises and threats] are functionally equivalent in their impact.").

expressed; implied by silence or silent acquiescence," and defining "tacit contract" as "[a] contract in which conduct takes the place of written or spoken words in the offer or acceptance (or both)"). And given the absence of any formal arrangements, a witness's statement that he has no expectation of favorable treatment concerns only his subjective understanding, and cannot typically be demonstrably falsified. Likewise, the prosecutor can argue to the jury that the witness is testifying disinterestedly,[8] which artificially increases the witness's credibility—artificially, that is, because the premise of the argument is false. *See* Cassidy, *supra*, at 1132 (noting that the prosecutor's ability to argue that no benefits have been conferred is advantageous). If the tacit agreement is not disclosed, the defendant is left with only argument, not evidence, to attempt to counter the credibility that improperly accrues to the witness on account of his supposedly pure motive.

In order to guard against these dangers and facilitate *Brady*'s ultimate purpose of ensuring fair trials, this Court should hold that two types of evidence are subject to disclosure. First, any evidence that reasonably suggests that the prosecutor conveyed an expectation of favorable treatment to the testifying witness should be disclosed. *See Shaffer*, 789 F.2d at 690; *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir.1989)

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[8] This danger is not hypothetical. Here, the prosecutor implied that Davenport was motivated by altruistic motives. *See* J.A. at 277 (Miller's closing argument) ("Bill Davenport told you that the man [Petitioner] came there [to Davenport in jail] and told him what happened and he had no remorse and no sorrow whatsoever and that is why he [Davenport] *was in here testifying and telling you what he heard.*"(emphasis added)).

(holding that the state must disclose evidence of the witness's impending commutation hearing notwithstanding the district court's finding that no agreement existed between the state and the witness); *cf. Giglio*, 405 U.S. at 153, 92 S.Ct. 763. This expectation creates the incentive for false testimony, and the jury should be allowed to consider this evidence and decide for themselves whether the prosecutor's conduct affected the witness's testimony, regardless of whether the witness acknowledges a subjective understanding that he is testifying pursuant to a *quid pro quo* exchange.

Second, the prosecution should be required to disclose any evidence in its possession that suggests that the witness actually harbors an expectation of favorable treatment, regardless of whether the prosecution created such an expectation. *See United States v. Risha*, 445 F.3d 298, 303 n. 5 (3d Cir.2006) ("There can be no dispute that the information in question is favorable to the defense because [the witness's] expectation of leniency in the state proceedings could have been used to impeach him."); *Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir.2002) ("Todd cannot prove an agreement existed. He argues that at the very least [the witness] had an 'expectation' of benefit. But what one party might expect from another does not amount to an agreement between them. *And Todd does not argue that the state knew of [the witness's] expectation.*"(emphasis added)). *Brady*'s concern is not with prosecutorial bad faith, but with accurate outcomes. *See* 373 U.S. at 87, 83 S.Ct. 1194; *see also Bagley*, 473 U.S. at 675, 105 S.Ct. 3375. Even if the prosecution was wholly innocent in creating the witness's unfounded impression that favorable

testimony would be rewarded, that impression nevertheless has the ability to color the witness's testimony in favor of the prosecution. The prosecution should not be able to knowingly suppress evidence of a witness's expectation of favorable treatment merely because the prosecution did not willfully cultivate it.

Construing "promises of reward" or "inducements" to include these two types of evidence would promote the disclosure of evidence actually likely to bias prosecution witnesses. In contrast to the rule proposed by the majority, which would require something akin to a formal agreement before any evidence was subject to disclosure, *see* Majority Op. at 235; *see also Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir.2003) ("The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony."), this rule would foreclose a crafty prosecutor's strategy of eschewing a formal agreement, only to achieve the same result through innuendo or implication. Additionally, it would resolve the nebulous issue of determining whether subjective expectations had given rise to a mutual understanding between the prosecution and the witness by making that issue one for the jury. If the prosecution made statements implicitly offering leniency in exchange for testimony, or if the witness made statements implying that he possessed such an expectation, the jury could consider whether an agreement existed, and weigh the witness's testimony accordingly.

The majority mischaracterizes the rule proposed by the dissent as creating "a new definition of *Brady*

material that includes possible post-trial witness favorable treatment." Majority Op. at 234. The rule proposed by the dissent does not require pre-trial discovery of post-trial witness treatment. Rather, the dissent simply proposes that we adopt the conclusion compelled by *Giglio* and *Bagley*-namely, that the prosecution must disclose evidence of any possible tacit agreements between it and prosecution witnesses prior to trial.

In the case before us, though Miller's testimony at the evidentiary hearing confirms that no explicit agreements existed, his testimony does not preclude the possibility that he conveyed an expectation of lenient treatment that he intended to fulfill. See J. A. at 475 ("I didn't promise Davenport anything, and I didn't make any agreements with him. . . ."). Similarly, the district court made no factual findings on this matter. If such a mutual understanding occurred, then a tacit agreement existed between Davenport and the prosecution, which was subject to disclosure under *Giglio*, 405 U.S. at 154–55, 92 S.Ct. 763.

The evidence in this case strongly suggests that a tacit agreement existed between the prosecution and Davenport. This inquiry involves the choice between two competing hypotheses: Either the prosecution provided favorable treatment to Davenport because of an implied understanding that valuable testimony would be rewarded, or the prosecution never reached an implied understanding with Davenport, and Davenport independently provided valuable testimony, at which point the prosecutor decided to reward him. If the former occurred, the tacit agreement should have been disclosed; if the latter occurred, no *Brady* violation occurred because no *Brady* material existed.

Compare, e.g., Shaffer, 789 F.2d at 689, *with Todd*, 283 F.3d at 849.

The first hypothesis is significantly more plausible, for two reasons. First, the course of dealings between the parties suggests that a mutual understanding existed. Davenport approached Miller seeking to provide testimony in exchange for favorable treatment. Miller made a notation of the preferential treatment that Davenport sought. Shortly thereafter, and before Davenport testified, the prosecuting office *nolle prosequied* two counts of grand larceny and two counts of concealing stolen property against Davenport. And approximately two weeks after Davenport provided incriminating testimony and Petitioner was convicted, Miller wrote a letter to the parole board—which accords with the Notes' indication that Davenport's parole date was discussed. This course of conduct is unlikely to be the result of coincidence, thus lending support to the contention that an unstated understanding existed between Miller and Davenport.

Second, neither prosecutors nor jailhouse informants are generally disposed to altruistic behavior, and the fact that a testifying jailhouse witness subjects himself to personal danger makes such behavior even less likely to stem from disinterested motivations. *See* J. A. at 475 (testimony of Miller) ("I felt that [Davenport] would now [after testifying] be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison."). Prosecutors are aware of this expectation, and have every incentive to encourage it. *See* J.A. at 476 ("Everybody wants something, and I'm sure Davenport wanted something."). The parties'

incentives therefore encourage the creation of tacit agreements.

In sum, the record in this case strongly, though not conclusively, suggests the existence of a tacit agreement. Generally speaking, whether the prosecution and the witness reached an unspoken understanding is a factual matter for the state court or federal district court. Here, Petitioner argued before the district court that the record demonstrated a tacit agreement, but the district court made no factual findings on the matter. In light of this record, the majority errs by unjustifiably resolving this factual matter against Petitioner, thereby expounding an unduly restrictive and incorrect view of tacit agreements as a matter of law.[9]

D.

A petitioner can establish prejudice by showing that "there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375. This standard does not require that it is more likely than not that the verdict would have been different without the evidence, and is substantially less demanding than a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. The prejudicial effect of any favorable evidence suppressed by the state must be viewed cumulatively, as opposed to item-by-item, and if the suppressed

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[9] Even under the majority's erroneous view of prejudice, the case should be remanded so that the district court can resolve this factual issue. However, because the Notes and Davenport's *nolle prosequied* charges establish prejudice under *Brady*, remand is unnecessary.

evidence collectively establishes prejudice, no harmless error inquiry is necessary. *Id.* at 435–36, 115 S.Ct. 1555.

Davenport's testimony was critical to the prosecution. Petitioner was convicted of first-degree murder with respect to Mrs. Wallace, and Davenport provided the only direct evidence of premeditation, which was a necessary element of the offense. *See State v. Johnson*, 661 S. W. 2d 854, 860 n. 1 (Tenn. 1983) (quoting Tenn.Code. Ann. § 39-2-202 (defining first degree murder), *repealed*, 1989 Pub. Acts ch. 591, § 1). Davenport's testimony was also crucial to the prosecution's second-degree murder case because it provided the only direct evidence that Davenport was the shooter, thereby greatly strengthening what was otherwise a weak and entirely circumstantial case.[10]

In light of the state's insubstantial case, the importance of Davenport's testimony cannot reasonably be disputed. Miller, in fact, acknowledged that "the state did not have a strong case without the testimony of William Davenport." J.A. at 501. Miller reaffirmed this statement during habeas proceedings. If the jury disbelieved Davenport's testimony, they could easily have acquitted Petitioner on both counts, as the remaining evidence required the jury to make considerable inferential leaps in order to connect the gaps in the state's case.

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[10] The physical evidence in the case consisted of laboratory results indicating that Petitioner could have fired a gun, and bullets of the same type used in the murder found on Petitioner at the time of his arrest. The state lacked the murder weapon, eyewitnesses to the crime, or physical evidence, such as blood, that connected Petitioner to the victims.

Had the Notes and the evidence of the *nolle prosequied* charges been disclosed by the state, there is a reasonable probability that the jury would have returned a verdict of not guilty on both counts. These pieces of evidence, considered cumulatively, would have supplied proof of Davenport's self-interested motive, and a juror considering Davenport's testimony in light of this evidence might well have concluded that Davenport had seized an opportunity to fabricate a story to serve his own purposes. To recount, the Notes demonstrated that Davenport had approached Miller seeking specific benefits. The Notes also indicated that Miller knew what benefits Davenport sought, and that Miller was aware of Davenport's parole eligibility. This evidence would have allowed the jury to infer that Davenport was testifying due to an expectation of lenient treatment, which in turn would have provided the jury with a substantial reason to doubt the veracity of Davenport's testimony. *See Shaffer*, 789 F.2d at 688–89 (finding materiality where the evidence impeached a witness whose credibility was vital to the outcome of the trial); *Reutter*, 888 F.2d at 581–82 (finding a reasonable probability of a different outcome where the jury was not informed of the existence of an impending commutation hearing of a key witness).

The *nolle prosequied* charges were also valuable impeaching evidence. In evaluating this basis for impeaching Davenport's credibility, the relevant question is not whether the disposition of Davenport's charges and his offer to testify were actually linked. Instead, the evidence would have proved valuable if the jury could have found that Davenport believed that these events were connected. The jury here could easily have found that Davenport thought that his offer

to testify caused the favorable result he received on his pending criminal charges. Davenport would have known that he and Miller discussed his convictions, and that the same prosecuting office had extended Davenport a highly favorable plea arrangement approximately one month later. This evidence would have aided Petitioner's impeachment efforts in two distinct but mutually reinforcing ways. First, Petitioner could have argued that Davenport's receipt of favorable treatment from the prosecution motived Davenport to skew his testimony out of gratitude or a sense of obligation. *See Wisehart*, 408 F.3d at 324 (noting that testimony can be affected by benefits previously bestowed). Second, the receipt of favorable treatment in the past may have amplified Davenport's expectation that a good performance on the witness stand would lead to lenient treatment, providing Davenport with an increased incentive to shape his testimony to benefit the prosecution. The logic is simple: If the prosecution rewarded Davenport for making efforts to cooperate, it stands to reason that further cooperation will lead to additional rewards. This incentive would be especially strong considering that the benefits that Davenport sought had not yet been bestowed.

The majority's first error in considering prejudice stems directly from its failure to consider Davenport's *nolle prosequied* charges suppressed. Because this evidence is not included in the majority's calculus, the majority ignores the fact that Petitioner was deprived of the opportunity to argue that Davenport had already received favorable treatment from the prosecution. This error also affects the overall magnitude of the impeaching evidence, which of course must be

considered cumulatively. *See Kyles*, 514 U.S. at 436, 115 S.Ct. 1555.

The majority errs again in discrediting the suppression of the Notes because "[t]he jury was apprised of Davenport's status and the possible other reasons for his decision to testify, namely, that he wished to secure early parole as a result of his participation in the Bell case." Majority Op. at 237. Here, the flaw in the majority's reasoning is that it allows *argument* to substitute for *evidence*. Though the jury was aware that Davenport had an upcoming parole hearing, they were provided with no evidence that Davenport's parole hearing was connected to his decision to testify. As it was, Petitioner's claim that Davenport was testifying in order to increase his chances of a favorable result at the parole hearing must have struck the jury as unsubstantiated speculation. Had Petitioner instead proved his claim with reliable evidence provided by the prosecutor himself, there is a reasonable probability that Petitioner's argument would have convinced the jury, which in turn would have discredited Davenport.

Additionally, the majority ignores two other valuable arguments that Petitioner could have advanced had he been in possession of the Notes and the *nolle prosequied* charges. First, as noted above, Miller suggested to the jury that Davenport was motivated to testify by his abhorrence of Petitioner's lack of sorrow and remorse. Armed with the suppressed evidence, Petitioner could have met this suggestion with powerful evidence that Davenport's testimony was opportunistic, not altruistic. Second, Miller misleadingly told the jury that he had no "say-so" with the parole board. By demonstrating that

Miller had seen fit to record the date of Davenport's parole eligibility, Petitioner could have mustered some argument that Miller, though lacking formal authority, might be able to exercise some measure of influence. At the very least, the fact that Davenport knew that his parole hearings were discussed with Miller would have provided a basis for arguing that Davenport thought Miller capable of bestowing such a favor on his behalf.

In sum, the suppressed evidence handicapped Petitioner's efforts to discredit Davenport. Had the evidence been disclosed, there is a reasonable probability that the jury would have doubted Davenport and acquitted Petitioner.

III.

For the foregoing reasons, I respectfully dissent.

KAREN NELSON MOORE, Circuit Judge, dissenting.

Although I agree fully with the primary dissenting opinion, I write separately to express my befuddlement regarding the reason for rehearing this case en banc. The text of Federal Rule of Appellate Procedure 35 is clear: "An en banc hearing or rehearing is not favored." Fed. R.App. P. 35(a). Rule 35 limits the reasons for granting rehearing en banc to (1) ensuring "uniformity of the court's decisions," and (2) resolving "a question of exceptional importance." *Id.* The text of our parallel circuit rule is clear as well: "A suggestion for rehearing en banc is an *extraordinary procedure* which is intended to bring to the attention of the entire Court a precedent-setting error of *exceptional public importance* or an opinion which *directly conflicts* with prior Supreme Court or Sixth Circuit precedent." 6 Cir. R. 35(c) (emphasis added). And lest anyone think

that a panel's "getting it wrong" qualifies as a matter of exceptional public importance, our Rule notes that "[a]lleged errors . . . in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing *but not for rehearing en banc*." *Id.* (emphasis added).

After reading the panel's decision and the parties' supplemental briefs, I was uncertain why a majority of this court had agreed to rehear this case en banc. Nowhere did either of the parties identify any inconsistency of the panel's decision with prior decisions of this court (or with Supreme Court decisions, for that matter). Nor did the parties highlight any question of exceptional importance. To the contrary, the briefs reflected a rather pedestrian disagreement regarding whether Petitioner Bell had offered sufficient evidence to establish a tacit agreement.

I had hoped that oral argument would clarify my confusion. Certainly, I thought, either the advocates or my colleagues on the bench would highlight the exceptional importance of this case. I had believed that after oral argument, I would see clearly that this dispute was not just a question of whether record evidence supported the panel majority's opinion, but instead a complicated *legal* question that required fourteen seasoned legal minds to resolve. Suffice it to say, I am disappointed.

The entire debate at oral argument—as in the briefs—centered not on *whether* a petitioner could premise a *Brady* violation on the prosecutor's failure to disclose a tacit agreement. The State's counsel conceded—both in its brief, Appellee's Supp. Br. at 12,

and at oral argument—that *Brady* and its progeny support such a rule. Instead, the parties disputed whether Bell's evidence *established* such an agreement. In other words, the State argued that the panel had gotten the facts wrong—that the evidence was insufficient, notwithstanding the panel's opinion. But as noted above, such an argument has no place before the en banc court. *See* 6 Cir. R. 35(c).

We do not convene en banc to exercise plenary review over panel decisions. Yet that is precisely what has happened here because the State has failed to identify either a conflict between the panel decision and binding precedent or a matter of exceptional public importance that this case raises. Because I believe that Federal Rule of Appellate Procedure 35(a) and Sixth Circuit Rule 35(c) preclude us from reviewing en banc the panel's decision, I would **DISMISS** the petition for rehearing en banc as improvidently granted. I respectfully dissent on that basis. Having failed to convince my colleagues that we should dismiss the petition as improvidently granted, I join the primary dissent on the merits.

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting in part and concurring in part.

I agree with Judge Moore that rehearing *en banc* was improvidently granted in this case and, for that reason, I would vacate the order granting rehearing and reinstate the panel opinion. The dispositive question in this section 2241 matter boils down to the sufficiency or insufficiency of the evidence presented on the petitioner's behalf in district court and, therefore, fails to meet the requirements of Federal Rule of Appellate Procedure 35(a).

That said, however, because the panel opinion has been vacated by order of a majority of the court, it becomes necessary to redetermine the principal issue raised on appeal. On that score, I would vote in conformity with the majority's analysis of the facts and hold that the evidence fails to establish the existence of a tacit agreement between the state prosecutor, Miller, and the state's witness, Davenport.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEPHEN M. BELL,	)	
Petitioner,	)	
	)	No. 3:95-0600
v.	)	JUDGE HAYNES
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

ORDER

In accordance with the Memorandum filed herewith, the Petitioner's amended petition for a writ of habeas corpus is DENIED. Petitioner has ten (10) days to file a statement of the issues, if a Certificate of Appealability under 28 U.S.C. (C)(1)(2) and (3) is sought.

This is the Final Order in this action.

IT IS SO ORDERED.

ENTERED this the 25th day of March, 2004.

/s/William J. Haynes, Jr.
WILLIAM J. HAYNES, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEPHEN M. BELL,	)	
Petitioner,	)	
	)	No. 3:95 0600
v.	)	JUDGE HAYNES
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

MEMORANDUM

Petitioner, Stephen M. Bell, filed this petition under 28 U.S.C. § 2241 et seq. for the writ of habeas corpus to vacate his state convictions for murder in the first and second degrees arising out of the September 6, 1986 deaths of Jean Lynn Wallace and Herman Harrison Wallace. (Docket Entry Nos. 5 and 44). Petitioner asserts fourteen claims, including claim for ineffective assistance of trial counsel, insufficient evidence for his first degree murder conviction, prosecutorial misconduct, unduly suggestive lineup, and denial of his right to confront witnesses by the admission of hearsay evidence at his state court trial.

In earlier proceedings, the Respondent filed a motion to dismiss or in the alternative for summary judgment (Docket Entry No. 28) to which Petitioner responded. (Docket Entry No. 33). The Court appointed counsel for the Petitioner. (Docket Entry No. 36). On September 6, 2000, Petitioner filed an amended petition for writ of habeas corpus. (Docket Entry No. 44).

Respondent then filed a supplemental motion to dismiss or in the alternative for summary judgment. (Docket Entry No. 46). The Petitioner moved for discovery. (Docket Entry No. 54) that the Court granted. (Docket Entry Nos. 60 and 61). Petitioner also filed replies to Respondent's motion to dismiss or for summary judgment (Docket Entry Nos. 51, 78, 83 and 84) as well as a second motion for discovery that was granted. (Docket Entry No. 76 and 85).

As to Respondent's motions to dismiss and/or for summary judgment (Docket Entry Nos. 28 and 46), the Court concluded that most of Petitioner's claims were not fairly presented to the state courts and were also procedurally defaulted. (Docket Entry No. 88). The Court concluded that for those claims, the Petitioner's state post-conviction counsel's failures to raise those claims did not establish cause to excuse those defaults. Id. The Court, however, found material factual disputes and the need to complete discovery warrant on certain claims for ineffective assistance of counsel at trial and on direct appeal; the prosecutor's withholding of exculpatory evidence; the alleged insufficient evidence to support his conviction; and the denial of adequate voir dire of potential jurors. Id. Thus, the Court denied the Respondent's motion to dismiss or for summary judgment as to those claims.

An evidentiary hearing was set and set forth below are the Court's findings of fact and conclusions of law on Plaintiff's remaining claims.

FINDINGS OF FACT

State Court Proceeding

The facts giving rise to Petitioner's convictions, as found by the Tennessee Criminal Court of Appeal are as follows:

The victims, Herman Harrison Wallace, a/k/a Mad Dog, and his wife, Jean Lynn Wallace, were street people who camped under the bridges along the Cumberland River. The defendant, Michael Bell, a/k/a Monk, a street person, camped between the Wallaces and Nashville's Riverfront Park.

Ronald Harrington, a street person, met the defendant on the railroad tracks near the camp sites on September 6, at approximately 3:00 p.m. Defendant was shirtless, wearing Levi's, a pair of shoes or boots and had a gun in his hand. Chained to his belt, was a billfold similar to that carried by truck drivers. The gun was either a .32 or .38 caliber revolver. Defendant appeared to be under the influence and stated that he had been "coking". During this exchange the defendant asked Mr. and Mrs. Harrington to take care of his dog if anything happened to him.

Edward Stansbury, an admitted alcoholic, testified that he spent the night of September 5, 1986, with friends on the river. The next morning he left but returned to the camp of Gary Hedges in the afternoon. At approximately 4:30 p.m. they noticed a man come up a path with a shiny black dog on a leash. The leash was a choker chain with a leather belt. When the man got to within twenty feet he spoke identifying himself as "Monk" and inquiring if "Mad Dog" and Jean were home. He walked down to the Wallaces' tent and entered. Up to this point he,

Stansbury, had no reason to commit to memory the man's clothing or facial features.

As Stansbury and Hedges continued to sit they heard the sounds of dogs fighting and people arguing in the Wallaces' camp, then they heard a muffled shot. Jean Wallace ran out of the tent screaming "He has killed my dog, he has killed my dog". She turned and re-entered the tent. Stansbury heard a distinctive gun shot and saw Jean Wallace backing out of the tent. As she cleared the entrance she fell and there were two more shots. He was sure he had seen the man fire the last shot. The man had been right behind Mrs. Wallace at the entrance. The man left the tent and left the scene. As the man was leaving he attempted to reload his pistol.

Stansbury described the culprit as 6'2" or 6'1", lanky, wearing fairly new blue jeans, a black baseball cap over his eyes, a sleeveless Levi jacket and T-shirt. His arms were tattooed. He had a billfold with a chain which appeared attached to a belt loop.

At a line-up conducted near the crime scene in the fading evening light, Stansbury was hesitant to identify the man in the number two spot. He was certain as to the man's jeans and nearby dog. While testifying he said he was still confused about the man's beard; he thought the culprit had short dark hair, but everything else about the number two man, the defendant, "fit to a tee".

Robert Moore, a Metropolitan Police Department homicide officer, arrived at the Wallaces' camp. He viewed the body of Mrs. Wallace and was directed to four shell casings that were lying on the ground. The soil in the area was fairly loose and the shell casings, covered with a chalky gray substance, were on top of the soil. Upon closer examination he was able to detect the smell of gun powder.

Officer Monte was advised that Mr. Wallace had been moved to General Hospital and although he appeared to have been shot as many as three times, only one slug had been found at the hospital. The officers at the crime scene made an extensive search and were able to recover a slug from the bloody mattress within the tent where Mr. Wallace had lain when shot.

After talking with Hedges and Stansbury and getting a general description of the suspect, the officers broadcasted a pick-up. Other detectives took the defendant in custody and returned him to an area near the crime scene. Due to the fading light in and around the camp sites and under the bridges, other officers were setting up a line-up of street type people in an open area nearby. Officer Moore explained that facial identification was not that strong at the crime scene, but clothing details and the overall characteristics of the participants were strong in the witnesses' minds.

Officer Mark Wynn and two other officers responded to a call that a man fitting the

description of the suspect was believed to be in the area of Fessler's Lane and Hermitage Avenue. They observed the suspect sitting on the curb and drinking a beer. He had a dog with him. He was taken in custody and found to have six unspent .38 caliber Special Winchester 158 grain bullets in his pants pockets, but no weapon was found. He was concerned about the dog so the officers agreed to transport the dog to the place of the line-up. (A picture of the dog wearing the choke chain and belt leash was shown the jury.)

Sergeant Tommy Jacobs testified that shortly after 5:30 p.m., September 6, 1986, he visited the camp site of the defendant and recovered eleven spent .38 caliber shell casings and a Winchester ammunition box that were lying on the ground. A holster was also recovered at the camp site. Later at the police station Sergeant Jacobs read the defendant his Miranda rights. When told he would be charged with murder, the defendant responded that he had not shot anyone, had not shot a gun and had never shot a gun.

Officer Darryl Ryan performed a nitric acid test on the defendant's hands. The swabs were sent to the crime laboratory.

Officer Archie Spain was sent to General Hospital. He took possession of a .38 caliber slug that was laying beside Mr. Wallace's body in the emergency room.

The State introduced testimony from three laboratory technicians. The first technician

had examined the defendant's clothing for blood stains but found none. The second technician, a criminalist, had examined the swabs from the defendant's hands for gunshot residue. This technician testified that "antimonium, barium and lead indicative of gunshot residue was found in significant concentrations on exhibit 5, hand swabs. These results indicate that the subject could have fired or handled a gun."

The third technician was a firearm examiner. He identified the two lead slugs filed earlier as exhibits as being fired from the same firearm. He had disassembled one of the live cartridges taken from the defendant's pockets to compare the lead to the other lead slugs. He was of the opinion the three were from the same manufacturer. The eleven spent shells taken from defendant's camp site were compared with the four spent shells recovered at the victims' camp site. Based upon his microscopic examination he was of the opinion they all had been fired from the same firearm.

The medical examiner testified in detail as to two gunshot wounds found upon Jean Wallace's body. In his opinion either one of these would have caused her death. From his examination of Herman Wallace, he concluded that death was the result of a saddle pulmonary embolus, a blood clot caused by the gunshot wounds which occluded the artery to the lungs.

The State rested its case in chief. Defendant's motion for judgments of acquittal were overruled.

Defendant testified that on the morning of September 6, 1986, he went to Riverfront Park. There he met two men with whom he pooled his money for the purchase of a fifth of wine. He and one of the men moved about in that general area of town during which time the man mentioned having a .38 caliber pistol but needed shells. They went to Service Merchandise where this person purchased a box of cartridges upon signing the log and entering an identification number. They returned to Riverfront Park and then to defendant's camp site where defendant did target practice with the man's pistol. At noon he went to lunch and returned to the camp. The men were still at his camp. Later defendant walked to Lebanon Road and Fessler's Lane where he was arrested.

He acknowledged being brought back to the Riverfront Park. He testified that he did not know he was in a line-up. When shown a picture of the line-up he identified one participant as the man who purchased the shells that morning.

Defendant explained that his statement to Sergeant Jacobs of having never fired a gun had reference to a gun used to murder someone. He was unable to explain why he had first said his dog had been with him all day

and changed to say the dog was not with him all day. He denied shooting the Wallaces.

The State called Billy Joe Camden as a rebuttal witness. This was the man who had purchased the box of shells at Service Merchandise on lower Broadway. Camden made the purchase at the request of the defendant. While they were together the defendant did not have his dog with him. After the purchase of the ammunition they went their separate ways. He did not go to the defendant's camp site nor witness him fire a gun. He was taken from Riverfront Park for the line-up. Camden testified that he owned a .22 caliber rifle but never owned a .38 caliber pistol.

State v. Bell, 1989 WL 86583 (Tenn.Crim.App.).

Federal Habeas Proceeding

The proof at the evidentiary hearing focused on the adequacy of the Petitioner's trial counsel representation and Petitioner's Brady claim. The proof of ineffective assistance of trial counsel centered on the defense counsel's failure to develop Petitioner's mental illness as a defense to the first degree murder charges. The Brady claim involves the state's prosecutor's withholding of a prisoner witness's statement requesting favorable treatment for his testimony against Petitioner.

Dr. Pamela Auble a psychologist, conducted a neuropsychological evaluation of Petitioner and administered a battery of psychological tests. Dr. Auble also interviewed Bell. In sum, Dr. Auble opined that Bell's significant intoxication and depression

probably affected his mental ability and faculties so as to preclude him from killing these victims with premeditation and deliberation.

As to Petitioner's trial counsel's performance, Ross Alderman, an experienced defense counsel and former prosecutor, then Deputy Public Defendant and now Public Defender for Davidson County, was one of Bell's trial counsel. Alderman was aware that Bell had a history of substance abuse and blackouts. Alderman also sought Bell's institutional records from mental hospitals and mental institutions. At Alderman's request, the state trial court ordered a pretrial mental evaluation of Bell. The initial admitting diagnoses was major depression with alcohol and drug abuse and a subsequent diagnosis of alcohol dependency. Petitioner, however, was found competent to stand trial and to defend himself.

Alderman testified that Bell insisted to him that he did not commit this offense and, the defense counsel pursued that trial strategy. In a word, Bell insisted on an identity defense. In Alderman's opinion, reliance on Bells' mental history and lack of memory were inconsistent with Bell's insistence that he did not commit the offense. Thus, Alderman did not pursue any further investigation of Bell's mental history. Alderman viewed intoxication as the preferable defense and evidence at trial supported this defense. The proof at trial was that Petitioner had been drinking and was intoxicated at the time of the killings.

In a pretrial discovery motion, Alderman requested Brady material including any agreement the state had with any witness, but he did not receive any response.

William Davenport, a state prisoner who was in custody with the Petitioner, offered to testify and

testified for the State that Bell admitted to him killing the two victims. Ron Miller, the state trial prosecutor, began his questioning of Davenport with Davenport's contact of his office as follows:

Q. All right, Mr. Davenport, I believe that back in September or October Detective Moore and I came out to talk to you after you had notified General Shriver of a certain conversation you had with the defendant?

A. Yes sir.

Q. Have you ever seen this defendant, Stephen Monk Bell before?

A. Yes, sir, I have.

Q. When is the first time you saw him?

A. I believe it was in September around the 19th or the 23rd.

Q. 19th or 23rd of September of '86?

A. Yes, sir.

Q. And when you were brought over to face these pending charges in Davidson County you mentioned you were – had been served with a parole violation; is that correct?

A. Yes, sir.

Q. And when had you been paroled?

A. Pardon?

Q. When had you been paroled?

A. It was in '84.

Q. And are you now serving some time on that sentence.

A. No sir; I am not. I flattened that sentence out.

Q. You flattened that sentence out?

A. Yes, sir.

Q. And you are serving time now. When is you first parole eligibility on that date?

A. Pardon?

Q. When will you first meet the Board of Paroles on the sentence you are now serving?

A. I believe it is December 5, '87.

Q. And currently you are serving time at Tumey Center; is that correct?

A. Yes, sir; I am.

(Docket Entry No. 45 Attachment No. 9, Trial Transcript at Vol. II pp. 293-94) (emphasis added).

Petitioner's trial counsel cross examined Davenport about his criminal history and his parole prospects. Id. at pp. 297-301. In closing argument, Petitioner's trial counsel argued to the jury that Davenport's testimony was influenced by is upcoming parole hearing.

> Then we hear about William Davenport ... I want you to believe that, ladies and gentlemen, because I have got a parole hearing coming up in a matter of months and if I can go to the Parole Board and I can say, 'I have helped to convict Stephen Michael Bell,' that they might cut me some slack because they violated my last parole when I committed another crime, so I need you to believe me, ladies and gentlemen. That is why I called the District Attorney's office; that is why I spoke to the police and the District Attorney and that is why I came to testify, but you believe me.

Id. at Addendum No. 9, Vol. IV at pp. 451-52.

Ron Miller, the sate prosecutor testified at the evidentiary hearing that he was made aware of Davenport's offer to testify, interviewed Davenport

and made notes of his interview before trial. Petitioner Exhibit 13. Miller's notes reflect that Davenport requested to be moved to a less restrictive facility: "wants to go to Red Building." Id. Miller insists that he did not act upon that request during the interview or during the trial. There is not any proof that Davenport was ever moved or transferred prior to his testimony at Bell's trial.

Miller admits that after Bell's trial, that ended on March 5, 1987. (Docket Entry No. 45, Addendum No. 9, Vol. 4 at p. 508), on March 19, 1987, he wrote a letter to the Tennessee Board of Parole, citing Davenport's testimony as critical to the state's case and requesting favorable consideration of parole for Davenport. Petitioner Exhibit 12. Miller's letter reads, in pertinent part: "The State did not have a strong case without the testimony of William Davenport ... Due in part to Mr. Davenport's testimony, we received murder conviction in both cases ... Based upon his cooperation, and the possibility of retaliation from other prisoners because of his testimony, we are requesting that William Davenport be considered for parole at the earliest eligibility date." Id. Davenport was awarded parole on July 20, 1987. Petitioner Exhibit 15.

Alderman was unaware of Davenport's September 24, 1986 letter to the District Attorney General offering to testify against Bell. If Alderman had known of Miller's letter, he would have raised that issue in his motion for a new trial. Yet, Alderman did not believe that Bell was convicted solely because of Davenport's testimony.

CONCLUSIONS OF LAW

Of the Petitioner's claims that survived the procedural default analysis,[1] the Court notes that there was not any proof that would undermine the state courts' findings of fact to overcome the statutory presumption of correctness. Thus, the Petitioner's claim on the insufficiency of the evidence to support his conviction lacks merit. Similarly, the proof did not establish any support for habeas relief on his voir dire claim.

As to the Brady, claim, under Brady v. Maryland, 373 U.S. 83, 87 (1963), the state must disclose evidence in its possession that is favorable to the accused and material to guilt or punishment. "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. The Brady obligation, however, does not translate to an unfettered right of the accused to discover all exculpatory evidence in the government's possession. Weatherford v. Bursey, 429 U.S 545, 559, (1977).

In Kyles v. Whitley, 514 U.S. 419, (1995), the Court restated Brady's underlying principles and defined the types of Brady claims.

> [T]hree situations in which a Brady claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it

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[1] Despite the Court's earlier ruling, the Respondent continues to argue procedural default. Those issues were decided in the Court's earlier Memorandum (Docket Entry No. 88).

> knew or should have known was perjured, 427 U.S., at 103-104, 96 S.Ct., at 2397-2398; second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, id., at 104-107, 96 S.Ct., at 23989-2399; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Id., at 108, 96 S.Ct., at 2400.

Id. at 432. (emphasis added).

In Kyles, the Court also reiterated that Brady requires disclosure of exculpatory materials as well as impeachment evidence, without a request from the defendant

> [In] United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for Brady purposes, and it abandoned the distinction between the second and third Agurs circumstances, i.e., the "specific-request" and "general- or no-request" situations. Bagley held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Id. at 433.

To set aside conviction for a Brady violation, the evidence at issue must be material to the case, i.e., the nondisclosed evidence must raise the reasonable probability of acquittal.

> Four aspects of materiality . . . bear emphasis. Although undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). * * * [the] touchstone or materiality is a "reasonable probability" of a different result and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S., at 678, 105 S.Ct., at 3381.
>
> The second aspect of Bagley materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough

left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

* * *

Third, . . . once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review.

* * *

The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item. As Justice Blackmun emphasized in the portion of his opinion written for the Court, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. Id., 473 U.S., at 675, 105 S.Ct; at 3380 and n. 7. We have never held that the Constitution demands an open file policy. . .

Kyles 514 U.S. at 434, 435, and 436(emphasis added).

More recently, the Supreme Court found a Brady violation sufficient to establish cause and prejudice to excuse a procedural default as well as to grant habeas relief in Banks v Dretke, 540 U.S.—(2004), the state did

not disclose that a state witness was a paid informant and that another state witness's testimony was perjurious. As to Brady, the Court stated:

> Brady, we reiterate, held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. We set out in Strickler v. Greene, 527 U.S. 263, 281 - a Brady prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S., at 281-282.

Id.

The bad faith failure to preserve the exculpatory evidence can be ground to set aside a conviction. See Arizona v. Youngblood, 488 U.S. 51, 156-59 (1988). Accord, United States v. Braggs, 23 F.3d 1047, 1051 (6th Cir. 1994).

In the Sixth Circuit, materiality was defined as "'any and all impeachment evidence . . . which tends to negate guilt'" and is "material to punishment." United States v. Presser, 844 F.2d 1275, 1280-81 (6th Cir. 1988). Stated differently, material evidence in this context is evidence "'so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce.'" United States v. Clark, 988 F.2d 1459, 1467 (6th Cir. 1993), (quoting Agurs, 427 U.S. at 107). The Court, quoting from Pennsylvania v. Ritchie, 480

U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), explained in Presser, that the obligation the Brady rule imposes on the government is:

> "the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. . . . [A] majority of this court has agreed, '[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome."

844 F.2d at 1281 (emphasis added). Accord, United States v. Driscoll, 970 F.2d 1472, 1482 (6th Cir.)

Under the Brady rule, the state prosecutor is the initial judge as to what evidence in his or her possession is subject to disclosure, and acts at his or her peril for failure to comply adequately with the rule. Presser, 844 F.2d at 1281. If the government fails to disclose Brady material, the defendant has a constitutional remedy only if he can show that there is a reasonable probability that "'the omission deprived the defendant of a fair trial.'" Presser, 844 F.2d at 1282 (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)). Any delivery of Brady material must be done in a timely manner and where delay results in prejudice to a defendant, a Brady violation occurs. United States v. Bencs, 28 F.3d 555, 560-61 (6th Cir. 1994).

Here, Davenport's statement to Miller, the state prosecutor requesting a favorable transfer in exchange

for his testimony is Brady material as adversely affecting Davenport's credibility. Davenport's request to be transferred should have been disclosed in response to Alderman's motion for Brady material. Yet, on the direct examination, Davenport's offer to testify and statements to the prosecutor were disclosed. Davenport's criminal history and his interest in parole eligibility were presented to the jury. Miller's letter requesting a favorable decision on Davenport's parole and Miller's decision to write the letter, occurred after the trial. This could not have been disclosed prior to trial. If Davenport's interest in parole did not influence the jury to reject his testimony, then in all probability, Davenport's request to be moved to another institution, if disclosed, would not have changed the jury's view of his credibility. The Court concludes that Bell has not shown a reasonable probability of acquittal to justify the writ on his Brady claim.

To establish ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). A reviewing court's scrutiny of counsel's performance is highly deferential. Strickland, 466 U.S. at 689 ("fair assessment of attorney performance requires that every effort be made to evaluate the conduct of counsel from counsel's perspective at the time [the subject conduct occurred]." Under Strickland, counsel's performance must be both inadequate and prejudicial to the defense.

> First, the defendant must show that counsel's performance was deficient. This requires

> showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

Here, the cited deficiency concerns Alderman's failure to develop Bell's mental capacity as a defense. Yet, Bell was found competent to be tried and to defend himself. Bell insisted that on an identity defense. With Bell's insistence, pursuit of his history of mental illness was an inconsistent theory. From Alderman's perspective the intoxication defense was the appropriate one. Proof was introduced at trial to support this defense. The Court concludes that Bell's trial counsel's performance was consistent with Sixth Amendment standards. This claim lacks merit.

Thus, Plaintiff's petition should be denied and this action should be dismissed.

An appropriate Order is filed herewith.

/s/William J. Haynes, Jr.
WILLIAM J. HAYNES, Jr.
United States District Judge
[Handwritten:] 3-25-04

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Stephen M. BELL, Petitioner-Appellant.,

v.

Ricky BELL, Warden, Respondent-Appellee.

No. 04-5523.

Argued: Feb. 2, 2006.
Decided: Aug. 25, 2006.

460 F.3d 739

Before: COLE, CLAY, and GIBBONS, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which COLE, J., joined.

GIBBONS, J. (pp. 764 – 768), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge:

Petitioner Stephen M. Bell appeals the March 26, 2004 order of the United States District Court for the Middle District of Tennessee granting summary judgment in favor of Respondent Ricky Bell, Warden, and dismissing Petitioner's habeas petition filed pursuant to 28 U.S.C. § 2254. For the reasons set forth

below, we **REVERSE** the district court order and **GRANT** the petition for writ of habeas corpus.

I. BACKGROUND

A. PROCEDURAL HISTORY

On March 5, 1987, a Tennessee state jury found Petitioner guilty of one count of murder in the first degree and one count of murder in the second degree. On March 17, 1987, the state trial court sentenced Petitioner to a life sentence and a twenty-year sentence for the respective crimes, with the sentences to run consecutively. On August 3, 1989, the state court of appeals affirmed the convictions. *State v. Bell*, C.C.A. No. 88-138-II, 1989 WL 86583 (Tenn.Crim.App. Aug.4, 1989) (unpublished opinion). The Tennessee Supreme Court denied permission to appeal.

On March 29, 1990, Petitioner filed a petition for state post-conviction relief. On November 2, 1992, the state trial court denied relief. On August 4, 1994, the state appellate court affirmed the denial of relief. *Bell v. State*, No. 01C01-9304-CR-00130, 1994 WL 406168 (Tenn.Crim.App. Aug.4, 1994) (unpublished opinion). The Tennessee Supreme Court denied permission to appeal.

On June 12, 1995, Petitioner filed a petition in the United States District Court for the Eastern District of Tennessee for habeas relief pursuant to 28 U.S.C. § 2254. His petition was subsequently transferred to the United States District Court for the Middle District of Tennessee. On October 23, 1998, the district court dismissed the petition without prejudice for inactivity. On March 19, 1999, Petitioner filed a motion to reopen the case or, alternatively, a motion to set aside the court's order of dismissal, and a renewed

motion for appointment of counsel. The district court granted the motion to reopen the case but denied the motion for appointment of counsel. On December 3, 1999, Respondent filed a motion to dismiss or, alternatively, a motion for summary judgment.

On January 24, 2000, Petitioner's case was transferred to Judge Haynes. The district court appointed a federal public defender as Petitioner's counsel and permitted Petitioner to file an amended complaint. On September 6, 2000, Petitioner filed an amended complaint. On September 22, 2000, Respondent filed a supplement to his previous motion to dismiss or, alternatively, a motion for summary judgment.

On April 26, 2002, the district court granted summary judgment against Petitioner for all but five of his claims: (1) insufficiency of the evidence; (2) ineffective assistance of trial and appellate counsel; (3) *Brady* violation; (4) failure to allow trial counsel to withdraw because of a conflict of interest; and (5) improper restriction of questioning of jurors during *voir dire*. The district court granted an evidentiary hearing with respect to the claims of ineffective assistance of trial and appellate counsel and the *Brady* violation.

On March 25, 2004, the district court denied the habeas petition. The court found that the claims of insufficiency of the evidence and improper *voir dire* were not supported by evidence sufficient to overcome the presumption of correctness afforded to the state court's findings of fact.[1] As to the *Brady* claim, the

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[1] For reasons unclear from the record, the district court never addressed the claim of failure to allow trial counsel to withdraw

court found that Petitioner had not shown "a reasonable probability of acquittal to justify the writ." (J.A. at 581.) As to the ineffective assistance of counsel claim, the court found that Petitioner had insisted on an identity defense at trial, so that he could not fault his counsel for not pursuing an intoxication or mental illness defense.

Petitioner timely filed a notice of appeal. The district court granted a certificate of appealability as to the *Brady* claim and the claim of ineffective assistance of counsel based on trial counsel's failure to present a complete defense and to investigate all avenues of defense. This Court declined to expand the certificate of appealability and limited the appeal to the preceding two issues.

B. FACTS

The following facts were found by the state appellate court on direct review:

> The victims, Herman Harrison Wallace, a/k/a Mad Dog, and his wife, Jean Lynn Wallace, were street people who camped under the bridges along the Cumberland River. The defendant, Michael Bell, a/k/a Monk, a street person, camped between the Wallaces and Nashville's Riverfront Park.
>
> Ronald Harrington, a street person, met the defendant on the railroad tracks near the camp sites on September 6, at approximately 3:00 p.m. Defendant was shirtless, wearing Levi's, a pair of shoes or boots and had a gun in

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because of a conflict of interest. Petitioner, however, does not raise this argument here on appeal.

his hand. Chained to his belt, was a billfold similar to that carried by truck drivers. The gun was either a .32 or .38 caliber revolver. Defendant appeared to be under the influence and stated that he had been "coking". [sic] During this exchange the defendant asked Mr. and Mrs. Harrington to take care of his dog if anything happened to him.

Edward Stansbury, an admitted alcoholic, testified that he spent the night of September 5, 1986, with friends on the river. The next morning he left but returned to the camp of Gary Hedges in the afternoon. At approximately 4:30 p.m. they noticed a man come up a path with a shiny black dog on a leash. The leash was a choker chain with a leather belt. When the man got to within twenty feet he spoke identifying himself as "Monk" and inquiring if "Mad Dog" and Jean were home. He walked down to the Wallaces' tent and entered. Up to this point he, Stansbury, had no reason to commit to memory the man's clothing or facial features.

As Stansbury and Hedges continued to sit they heard the sounds of dogs fighting and people arguing in the Wallaces' camp, then they heard a muffled shot. Jean Wallace ran out of the tent screaming "He has killed my dog, he has killed my dog". [sic] She turned and re-entered the tent. Stansbury heard a distinctive gun shot and saw Jean Wallace backing out of the tent. As she cleared the entrance she fell and there were two more shots. He was sure he had seen the man fire

the last shot. The man had been right behind Mrs. Wallace at the entrance. The man left the tent and left the scene. As the man was leaving he attempted to reload his pistol.

Stansbury described the culprit as 6'2" or 6'1", lanky, wearing fairly new blue jeans, a black baseball cap over his eyes, a sleeveless Levi jacket and T-shirt. His arms were tattooed. He had a billfold with a chain which appeared attached to a belt loop.

At a line-up conducted near the crime scene in the fading evening light, Stansbury was hesitant to identify the man in the number two spot. He was certain as to the man's jeans and nearby dog. While testifying he said he was still confused about the man's beard; he thought the culprit had short dark hair, but everything else about the number two man, the defendant, "fit to a tee". [sic]

Robert Moore, a Metropolitan Police Department homicide officer, arrived at the Wallaces' camp. He viewed the body of Mrs. Wallace and was directed to four shell casings that were lying on the ground. The soil in the area was fairly loose and the shell casings, covered with a chalky gray substance, were on top of the soil. Upon closer examination he was able to detect the smell of gun powder.

Officer Moore was advised that Mr. Wallace had been moved to General Hospital and although he appeared to have been shot as many as three times, only one slug had been

found at the hospital. The officers at the crime scene made an extensive search and were able to recover a slug from the bloody mattress within the tent where Mr. Wallace had lain when shot.

After talking with Hedges and Stansbury and getting a general description of the suspect, the officers broadcasted a pick-up. Other detectives took the defendant in custody and returned him to an area near the crime scene. Due to the fading light in and around the camp sites and under the bridges, other officers were setting up a line-up of street type people in an open area nearby. Officer Moore explained that facial identification was not that strong at the crime scene, but clothing details and the overall characteristics of the participants were strong in the witnesses' minds.

Officer Mark Wynn and two other officers responded to a call that a man fitting the description of the suspect was believed to be in the area of Fessler's Lane and Hermitage Avenue. They observed the suspect sitting on the curb and drinking a beer. He had a dog with him. He was taken in custody and found to have six unspent .38 caliber Special Winchester 158 grain bullets in his pants pockets, but no weapon was found. He was concerned about the dog so the officers agreed to transport the dog to the place of the line-up. (A picture of the dog wearing the choke chain and belt leash was shown the jury.)

Sergeant Tommy Jacobs testified that shortly after 5:30 p.m., September 6, 1986, he visited the camp site of the defendant and recovered eleven spent .38 caliber shell casings and a Winchester ammunition box that were lying on the ground. A holster was also recovered at the camp site. Later at the police station Sergeant Jacobs read the defendant his Miranda rights. When told he would be charged with murder, the defendant responded that he had not shot anyone, had not shot a gun and had never shot a gun.

Officer Darryl Ryan performed a nitric acid test on the defendant's hands. The swabs were sent to the crime laboratory.

Officer Archie Spain was sent to General Hospital. He took possession of a .38 caliber slug that was laying beside Mr. Wallace's body in the emergency room.

The State introduced testimony from three laboratory technicians. The first technician had examined the defendant's clothing for blood stains but found none. The second technician, a criminalist, had examined the swabs from the defendant's hands for gunshot residue. This technician testified that "antimonium, barium and lead indicative of gunshot residue was found in significant concentrations on exhibit 5, hand swabs. These results indicate that the subject could have fired or handled a gun."

The third technician was a firearm examiner. He identified the two lead slugs filed earlier as

exhibits as being fired from the same firearm. He had disassembled one of the live cartridges taken from the defendant's pockets to compare the lead to the other lead slugs. He was of the opinion the three were from the same manufacturer. The eleven spent shells taken from defendant's camp site were compared with the four spent shells recovered at the victims' camp site. Based upon his microscopic examination he was of the opinion they all had been fired from the same firearm.

The medical examiner testified in detail as to two gunshot wounds found upon Jean Wallace's body. In his opinion either one of these would have caused her death. From his examination of Herman Wallace, he concluded that death was the result of a saddle pulmonary embolus, a blood clot caused by the gunshot wounds which occluded the artery to the lungs.

The State rested its case in chief. Defendant's motion for judgments of acquittal were overruled.

Defendant testified that on the morning of September 6, 1986, he went to Riverfront Park. There he met two men with whom he pooled his money for the purchase of a fifth of wine. He and one of the men moved about in that general area of town during which time the man mentioned having a .38 caliber pistol but needed shells. They went to Service Merchandise where this person purchased a box of cartridges upon signing the log and

entering an identification number. They returned to Riverfront Park and then to defendant's camp site where defendant did target practice with the man's pistol. At noon he went to lunch and returned to the camp. The men were still at his camp. Later defendant walked to Lebanon Road and Fessler's Lane where he was arrested.

He acknowledged being brought back to the Riverfront Park. He testified that he did not know he was in a line-up. When shown a picture of the line-up he identified one participant as the man who purchased the shells that morning.

Defendant explained that his statement to Sergeant Jacobs of having never fired a gun had reference to a gun used to murder someone. He was unable to explain why he had first said his dog had been with him all day and changed to say the dog was not with him all day. He denied shooting the Wallaces.

The State called Billy Joe Camden as a rebuttal witness. This was the man who had purchased the box of shells at Service Merchandise on lower Broadway. Camden made the purchase at the request of the defendant. While they were together the defendant did not have his dog with him. After the purchase of the ammunition they went their separate ways. He did not go to the defendant's camp site nor witness him fire a gun. He was taken from Riverfront Park for the line-up. Camden testified that he owned a

> .22 caliber rifle but never owned a .38 caliber pistol.
>
> Following argument of the attorneys and instructions from the court, the jury retired and deliberated. The jury returned to the courtroom and delivered the verdicts [of guilty of first-degree murder and guilty of second-degree murder].

State v. Bell, 1989 WL 86583, at *1-4.

The following facts were presented at the evidentiary hearing conducted by the district court:

Dr. Pamela Auble ("Auble"), an expert witness for Petitioner, testified that she conducted a neuropsychological evaluation of Petitioner on November 21, 2001. She reviewed numerous records indicating that Petitioner suffered a history of alcoholism and depression. In her interview with Petitioner, Petitioner stated that he had been drinking heavily for the month prior to the date of the murders, and he had also been drinking heavily on the day of the murders. He stated that he could not remember certain periods of time on the day of the murder. Auble concluded that Petitioner was significantly intoxicated on the day the shootings occurred. She opined that if Petitioner committed the shootings, he did so under significant inebriation and severe depression. Auble was of the belief that Petitioner would have been unable to form a premeditated and deliberate plan to kill the victims.

Next, Ross Alderman ("Alderman"), Petitioner's trial counsel, testified. Alderman testified that he had requested an initial mental health evaluation of Petitioner early on in his representation. The reason

for this request was that Petitioner admitted to a lengthy history of substance abuse and that Petitioner did not recall any events on the day of the murders because of blackouts. Alderman stated that he had made an initial investigation into Petitioner's history of alcohol abuse. Alderman testified that he believed that an intoxication defense was the most effective defense for Petitioner; however, Petitioner insisted on an identity defense, *i.e.*, he was not the shooter. On cross-examination, Alderman testified that a defense of identity and a defense of intoxication would have been inconsistent.

Alderman testified that William Davenport ("Davenport") was a key witness for the prosecution. Davenport testified at trial that he had a conversation with Petitioner while the two men were in custody where Petitioner admitted to shooting the victims. Also, Davenport testified that Petitioner admitted to shooting Mrs. Wallace because she was a witness to the shooting of Mr. Wallace. Alderman stated that the testimony was damaging in two ways: first, it negated the defense of identity; second, it provided a basis for premeditation with respect to the shooting of Mrs. Wallace.

Alderman testified that he requested any potentially exculpatory or impeachment evidence from the prosecution, and that the prosecution did not produce any such evidence. Alderman stated that he was aware that Davenport was in custody at the time directly preceding Petitioner's trial, but he did not know that the government had *nolle prosequied*[2] two

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[2] In other words, the government withdrew its prosecution of these charges. *See* Black's Law Dictionary 1070 (7th ed.1999).

counts of grand larceny and two counts of concealing stolen property against Davenport after Davenport contacted the prosecution concerning his conversation with Petitioner. Alderman testified that he was unaware that Davenport had received concurrent sentences for two convictions of concealing stolen property after Davenport contacted the prosecution concerning his conversation with Petitioner. Alderman testified that he was also unaware that the prosecution was going to write a letter to the parole board on behalf of Davenport after Petitioner's trial terminated. Alderman testified that he was also unaware that Davenport had originally contacted the prosecution to testify against Petitioner for a transfer of facilities or a work release program. On cross-examination, Alderman admitted that he knew that Davenport had an upcoming parole hearing, and that Alderman had argued this point to the jury as impeachment of Davenport.

Ross Miller ("Miller"), the prosecutor at Petitioner's trial, also testified at the evidentiary hearing. Miller testified that he did not promise Davenport anything in exchange for Davenport's testimony at Petitioner's trial. Miller testified that while he wrote a letter to the parole board on Davenport's behalf, he did not promise Davenport that he would do so. Miller admitted that Davenport first approached the prosecution about testifying against Petitioner, and that "[e]verybody wants something, and I'm sure Davenport wanted something." (J.A. at 476.) Notes taken by Miller at the first meeting between Miller and Davenport indicated that Davenport wanted a transfer of facilities or a work release program.

During closing arguments, Miller argued to the jury that he did not have any "say-so" with the parole board in Davenport's case. At the evidentiary hearing, Miller admitted that he did in fact write a letter to Davenport's parole board; in that letter Miller wrote that the prosecution did not have a strong case without Davenport's testimony. Davenport's testimony was important in that it provided Petitioner's motive for the shooting and established what had actually happened at the shooting. Miller admitted that Davenport was the prosecution's final witness in its case. Miller reiterated that he made no promises to Davenport.

II. DISCUSSION

A. THE DISTRICT COURT ERRED IN DENYING RELIEF ON PETITIONER'S CLAIM THAT THE PROSECUTION WITHHELD MATERIAL IMPEACHMENT INFORMATION REGARDING WITNESS WILLIAM DAVENPORT, IN VIOLATION OF *BRADY v. MARYLAND*, 373 U.S. 83 (1963).

1. Preservation of the Issue

Respondent contends that Petitioner's *Brady* claim is procedurally defaulted, as Petitioner did not present the *Brady* claim to any state court. While we agree that this claim is procedurally defaulted, we conclude that Petitioner has demonstrated adequate cause and prejudice to overcome that default.

The general rule in the § 2254 context is that if Petitioner's claim is procedurally defaulted in the state courts, the federal courts may not consider that claim on habeas review unless Petitioner demonstrates cause

and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 86-90, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). This Court generally employs a four-part test in deciding whether a claim is barred from federal habeas review because of state procedural default:

> First, the court must ascertain whether there is an applicable state procedural rule. Second, the court must determine whether the state courts actually enforce the rule. Third, the court must decide whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim. Finally . . . , if the criminal defendant did not comply with the rule, the defendant must demonstrate there was cause for him not to follow the procedural rule, and that he was actually prejudiced by the alleged constitutional error.

Jamison v. Collins, 291 F.3d 380, 385-86 (6th Cir.2002). The Supreme Court, however, has outlined an alternate inquiry when a party fails to exhaust his state remedies with respect to a claim:

> [I]f the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirements would now find the claims procedurally barred[,] ... there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Petitioner failed to exhaust his state court remedies, as he did not present his *Brady* claim to the state courts. As the district court correctly noted, this claim would now be barred by the state courts, as Tennessee statutory law establishes a one-year statute of limitations as to the filing of state post-conviction petitions and limits a petitioner to only one petition for post-conviction relief. Tenn.Code Ann. § 40-30-102. Petitioner's *Brady* claim is thus procedurally defaulted; the question remains as to whether Petitioner has demonstrated cause and prejudice to overcome this default.

The Supreme Court has specifically held that a petitioner shows cause for his failure to raise a *Brady* claim in state court "when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence." *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). Generally speaking, "when the factual basis of the claim was 'reasonably unknown' to the defendant's counsel," the defendant shows cause for failure to raise the claim during state proceedings. *Jamison*, 291 F.3d at 388 (internal citation omitted). A *Brady* claim may be reasonably unknown to a defendant, as the claim is based entirely on the fact that the prosecution withheld exculpatory evidence from the defendant. As this Court viewed the situation, "[s]uppression of exculpatory or favorable impeaching evidence by the state that results in an inability to raise claims relating to that evidence in state court establishes cause for the ensuing default." *Hutchison v. Bell*, 303 F.3d 720, 741 (6th Cir.2002).

In the instant case, Petitioner's counsel requested any exculpatory or impeachment evidence that the prosecution had in its possession, and the prosecution provided nothing. The prosecution did not inform Petitioner that Davenport had approached the prosecution to testify in exchange for a building transfer or a work release program; the prosecution did not reveal that shortly after a meeting with Davenport, the government dropped four criminal counts against Davenport and Davenport received concurrent sentences for two additional criminal counts; and the prosecution made no mention of any intention to aid Davenport in his upcoming parole hearing. Petitioner thus could not have made his *Brady* claim in state court because he had no way of knowing that the prosecution failed to disclose such evidence. Moreover, once the prosecution responded to Petitioner's request for exculpatory evidence with an empty hand, Petitioner was under no duty to engage in further investigation to determine whether the prosecution in fact withheld evidence. *See Banks*, 540 U.S. at 695, 124 S.Ct. 1256 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."). Petitioner's valid explanation for not raising the *Brady* claim in the state court proceedings is that he was unaware that the prosecution had withheld *Brady* material, and that he was justified in his reliance on the prosecution's representation that it had not withheld *Brady* material.

To deny cause in this case would be to allow the prosecution to doubly benefit from its actions: the prosecution could ignore its constitutional duty to provide exculpatory evidence, and it could evade

review for its behavior by asserting state procedural default. The jurisprudence of both the Supreme Court and this Court rejects this result and leads to the conclusion that Petitioner has shown cause for his failure to raise his *Brady* claim before the state courts.

In order to demonstrate prejudice with respect to a *Brady* claim, Petitioner must prove that the evidence suppressed by the prosecution was material so as to establish a *Brady* violation. *Banks*, 540 U.S. at 691, 124 S.Ct. 1256. As explained, *infra*, the prosecution failed to disclose material impeachment evidence of Davenport, and this failure resulted in a *Brady* violation. Thus, Petitioner has satisfied the prejudice prong.

2. Standard of Review

When a district court denies a habeas petition, this Court reviews its legal conclusions *de novo* and its factual conclusions for clear error. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir.1999).

Because Petitioner filed his habeas petition prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, the pre-AEDPA standard of review applies with respect to the conclusions of the state courts.[3]

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[3] Respondent argues that AEDPA applies to the instant case; Respondent's logic is that while Petitioner filed his original petition before the enactment of AEDPA, this original petition was dismissed by the district court and erased out of existence. As a result, when Petitioner filed his amended petition, there was nothing to amend, so that his amended petition was actually a re-filing that occurred after the enactment of AEDPA.

Respondent would have this Court ignore how Petitioner was able to file his amended petition; the district court previously granted his motion to reopen the case that derived from the

Under this standard, the Court "presume[s] the correctness of the state court factual findings, unless rebutted by clear and convincing evidence, and [it] review[s] determinations of law, or mixed questions of fact and law, *de novo*." *Smith v. Mitchell*, 348 F.3d 177, 198 (6th Cir.2004) (citations omitted).

3. Analysis

Petitioner has established that a *Brady* violation occurred during his trial. As a result, the district court erred in denying Petitioner habeas relief.

a. Legal Framework

In *Brady v. Maryland*, the Supreme Court held that the prosecution has a constitutional obligation under the Due Process Clause of the Fourteenth Amendment to disclose exculpatory evidence that is

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original petition. While it is certainly true that the district court dismissed this case, it is equally true that the district court undid this action when it reopened this case. Thus, the case before the district court as of its grant of the motion to reopen was that created by the original petition. Moreover, Respondent's claim that nothing existed for the amended complaint to act upon is inconsistent with his own actions: after the district court granted the motion to reopen, Respondent filed a motion to dismiss or, alternatively, a motion for summary judgment. If indeed nothing existed, then Respondent was filing this motion against a non-case, an absurd proposition. When the district court granted the motion to reopen, it resuscitated Petitioner's original complaint that had been previously dismissed. Since this complaint was filed before AEDPA's enactment, AEDPA does not apply.

This is ultimately an academic exercise, as the two claims presented to this Court were not presented to the state courts, and the state courts made no relevant findings of fact or legal conclusions as to these claims. Thus, the more stringent standard of review under AEDPA would have no effect, as there is nothing to review.

material to either guilt or punishment. 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Court emphasized that the purpose of such a rule was "avoidance of an unfair trial to the accused." *Id* The Supreme Court has held that the *Brady* rule extends to witness impeachment evidence. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." (internal quotations and citation omitted).).

In order to make a *Brady* claim, Petitioner must prove three elements: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

Of the three elements, the Supreme Court has offered the most guidance with respect to prejudice, also referred to as materiality. Materiality is established "if there is a reasonable probability that, had the [suppressed] evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Supreme Court emphasized four points as to materiality. First,

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would

> have resulted ultimately in the defendant's acquittal .... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Id. at 434, 115 S.Ct. 1555.

Second, materiality is not a sufficiency of the evidence test, meaning that even if the evidence, including the suppressed exculpatory evidence, is sufficient to support the conviction, a party may still maintain a *Brady* claim. *Id.* A party makes a *Brady* claim "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S.Ct. 1555. It is the lack of confidence in the verdict, not the ability to support the verdict with the entirety of the evidence, that is critical.

Third, "once a reviewing court ... has found constitutional error there is no need for further harmless-error review." *Id.* By definition, if this Court found a *Brady* violation, it would have had to have found a reasonable probability that the result would have differed with the inclusion of the suppressed evidence. In other words, no *Brady* violation is harmless. *Id.* at 436, 115 S.Ct. 1555.

Fourth, when the court analyzes materiality, the "suppressed evidence [must be] considered collectively, not item by item." *Id.* This places the attendant burden on the prosecution to look at all potential *Brady* evidence and to determine whether the cumulative

effect of such evidence would rise to the threshold level of materiality. *Id.* at 437, 115 S.Ct. 1555.

b. Application to This Case

i. Favorable Evidence

Petitioner points to three pieces of evidence that the prosecution did not disclose: (1) Davenport approached the prosecution to testify against Petitioner, motivated by his desire for a transfer of facilities or for a work release program; (2) shortly after Davenport spoke with the prosecution, the government *nolle prosequied* two counts of grand larceny and two counts of concealing stolen property against Davenport, and Davenport received concurrent sentences for two convictions of concealing stolen property; and (3) the prosecution wrote a letter to the parole board on behalf of Davenport. Petitioner's position is that such evidence was favorable because it would have impeached the testimony of Davenport, the prosecution's key witness and the only source of evidence with respect to premeditation under first-degree murder.

Respondent argues that this evidence was not favorable to Petitioner, because Petitioner has failed to show that an agreement existed between the prosecution and Davenport. Respondent points specifically to the testimony of Miller, who stated that he did not promise anything to Davenport in exchange for his testimony against Petitioner. In other words, there was no connection between Davenport's testimony and his lenient treatment, so that his lenient treatment was not impeachment evidence. In response, Petitioner asserts that *Brady* requires the disclosure of any evidence that may impeach a witness,

including evidence outside of an agreement between Davenport and the prosecution.

The parties raise an interesting question not yet addressed by this Court: whether an agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment. The Supreme Court has not spoken on this issue; it has only found that evidence of an express agreement between a witness and the prosecution is favorable evidence under *Brady*. *Giglio*, 405 U.S. at 152, 154-55, 92 S.Ct. 763.

Two circuits have specifically addressed the circumstance of a tacit agreement between the prosecution and a witness and have found that such an agreement is favorable evidence to be disclosed under *Brady*. In *Wisehart v. Davis*, the Seventh Circuit explained,

> The first and most common [way to impeach a witness based on benefits given to the witness by the prosecution] is by showing that the benefits were given in return for the witness's providing testimony that would help the prosecution. He might have told the prosecutor what he would testify to if called and the prosecutor might have explicitly agreed to give him specified benefits if he testified consistently with his proffer. ... Or there might have been a tacit understanding that if his testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge. ... Express or tacit, either way there would be an agreement, it would be usable for

> impeachment, and it would have to be disclosed to the defense.

408 F.3d 321, 323-24 (7th Cir.2005).

The Ninth Circuit has also found that a tacit agreement between a witness and the prosecution is favorable evidence under *Brady*. In *United States v. Shaffer*, a co-conspirator testified against another co-conspirator on narcotics charges. 789 F.2d 682, 685 (9th Cir.1986). The government failed to disclose that the witness had assets that were acquired with profits from the narcotics operation, and that the government knew about these assets and their nature but did not initiate forfeiture proceedings against the witness' assets. *Id.* at 689. The court concluded that a tacit agreement had been created between the prosecution and the witness whereby the witness could keep his ill-gotten assets in return for his testimony. *Id.* The court responded to the claim that no express agreement had been reached:

> The government contends that, because there was no explicit agreement on this matter, it had nothing to disclose. ... Apparently the government misunderstands the district court's ruling. While it is clear that an explicit agreement would have to be disclosed because of its effect on [the witness'] credibility, it is equally clear that facts which imply an agreement would also bear on [the witness'] credibility and would have to be disclosed.

Id. at 690 (internal citations omitted).

The Eighth Circuit has gone even further, holding that *no agreement* between the prosecution and a witness is required under *Brady*, so long as the

withheld evidence can impeach the witness. In *Reutter v. Solem*, the prosecution had failed to disclose that its star witness had applied for sentence commutation and that, coincidentally, the hearing for sentence commutation was to take place soon after his appearance at the petitioner's trial. 888 F.2d 578, 581 (8th Cir.1989). The court found a *Brady* violation, despite the lack of any form of agreement between the prosecution and the witness:

> Our conclusion does not depend on a finding of either an express or an implied agreement between [the witness] and the prosecution regarding the prosecution's favorable recommendation to the parole board. The District Court found there was no agreement and this finding is not clearly erroneous. The fact that there is no agreement, however, is not determinative of whether the prosecution's actions constituted a *Brady* violation requiring reversal .... We hold that, viewed in the context of petitioner's trial, the fact of [the witness'] impending commutation hearing was material ... and that petitioner therefore is entitled to relief.

Id. at 582. In addition, the court found that the prosecution's comment to the jury that the witness had "nothing that he could gain" from his testimony was "misleading and highly improper" when coupled with the prosecution's failure to disclose the commutation hearing. *Id.* While the court did not decide whether the comment alone would warrant a new trial, it found

that it further undermined the court's confidence in the conviction of the petitioner.[4] *Id.*

On the other end of the spectrum, the Second Circuit has held that favorable treatment for a witness is insufficient to show an agreement between the prosecution and the witness. In *Shabazz v. Artuz*, two witnesses testified against the petitioner in a shooting death that occurred during a robbery. 336 F.3d 154, 157 (2d Cir.2003). At the time of their testimony, they were charged with various narcotics and additional offenses. *Id.* at 156. Just as in this case, the prosecutor testified at an evidentiary hearing that he promised nothing to the witnesses in exchange for their testimony. *Id.* at 163. The prosecutor, however, did appear at the sentencing hearing of one of the

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[4] To be clear, the holding in *Reutter* did not rest on the fact that a prosecutor at the petitioner's trial was also a member of the sentence commutation panel that would hear the witness' petition. The Eighth Circuit did not so hold because it was disputed whether the prosecutor in question even voted on the witness' petition. *Id.* at 580. Instead, the court found:

> Here, the prosecution failed to inform the defense that the state's key witness, Trygstad, had applied for sentence commutation and that when he gave his testimony at petitioner's trial he already had been scheduled to appear before the parole board a few days later. This information obviously could have been used by the defense to attack Trygstad's credibility. We have little difficulty in concluding that the prosecution's failure to disclose this information was a *Brady* violation.

Id. at 581. The *Brady* violation derived from the prosecution's failure to disclose that the witness had a sentence commutation hearing directly following the petitioner's trial; the Eighth Circuit never even so much as mentions a prosecutor's disputed involvement with the sentence commutation hearing.

witnesses and asked the court to show leniency. *Id.* at 165. Moreover, the prosecutor approved a recommendation from the district attorney's office for a lenient sentence for the other witness. *Id.* The petitioner argued that the fact that the two witnesses in fact received favorable treatment after their testimony evidenced an agreement between the prosecution and the witnesses. *Id.* The court disagreed:

> [P]etitioner is correct that [the two witnesses] received a benefit because they testified against him. However, this fact, standing alone, does not establish that, prior to petitioner's trial, the District Attorney's Office promised [the two witnesses] leniency. The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony. That is not to say that a prosecutor may circumvent his *Brady* obligations by failing to reduce to writing a plea agreement or a promise of leniency. ... We hold only that the fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony.

Id. In our view, this holding leaves little room for a petitioner to establish a tacit agreement. By definition, a tacit agreement is an unspoken understanding and is identified primarily by actions in a particular context. If a petitioner cannot use favorable action alone on the

part of the prosecution to establish an agreement between the prosecution and a witness, the petitioner has a diminished chance to prove a tacit agreement, absent an admission by the parties of the unsaid understanding. Moreover, the language in *Shabazz* that indicates the prosecution need not disclose its intention of aiding a witness absent an actual promise to the witness demonstrates that the Second Circuit is, at the very least, hesitant to view a tacit agreement as favorable evidence under *Brady*.

We find the analysis of the Seventh and Ninth Circuits persuasive and find that a tacit agreement is favorable evidence under *Brady*. No principled reason exists for differentiating between spoken and unspoken agreements between the prosecution and a witness. The relevant fact under *Brady* is whether the evidence is exculpatory or impeaching. An express agreement between the prosecution and a witness is impeaching because it is evidence that the witness has an interest at stake; in other words, the witness is not impartial. *See, e.g., Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763. This same interest and partiality exist under a tacit agreement, and so this evidence would be equally impeaching and thus subject to disclosure under *Brady*. The fact that the agreement is unspoken does not lead to a diminishment of the witness' interest under the agreement.

The Second Circuit's approach in *Shabazz* has the markings of potential prosecutorial abuse. Under *Shabazz*, so long as the prosecution does not make a promise of assistance before the witness' testimony, the prosecution is not compelled to disclose any understanding between the prosecution and the witness. This holds true even if the prosecution in fact

intends to reward the witness with favorable treatment. While the *Shabazz* court stated that this "is not to say that a prosecutor may circumvent his *Brady* obligations by failing to reduce to writing a plea agreement or a promise of leniency," 336 F.3d at 165, a prosecutor would be able to circumvent her *Brady* obligations by simply not verbalizing or otherwise memorializing her intent to help the witness. Such a formalistic and technical evasion would eviscerate the *Brady* rule.

Moreover, a tacit agreement in this context is based on the transparent incentives for both the witness and the prosecution. The fact is that a jailhouse informant is one of the least likely candidates for altruistic behavior; his offer to testify is almost always coupled with an expectation of some benefit in return. The prosecution is not naive as to this expectation, and the prosecution also knows that when the value of the informant's testimony reaches a sufficient level, it is in the prosecution's interest to fulfill this expectation. At the most fundamental level, the arrangement is a *quid pro quo;* the informant knows he is giving something of value and expects something in return; the prosecution knows it is receiving something of value, and gives something in return. No written or spoken word is required to understand the nature of this tacit agreement. This is not to say that "a nebulous expectation of help from the state" is sufficient evidence for such an agreement. *Goodwin v. Johnson,* 132 F.3d 162, 187 (5th Cir.1997). But if a petitioner proves that a witness approached the prosecution to testify with the expectation of some benefit, and that the prosecution understood this expectation and fulfilled the expectation by actually bestowing some

benefit, the petitioner has sufficiently demonstrated a tacit agreement that must be disclosed under *Brady*.

This is exactly what occurred in Petitioner's case. Davenport approached the prosecution to testify against Petitioner. The evidence shows that Davenport was seeking some benefit in return; the prosecutor's notes indicate that a building transfer and a work release program were discussed by the parties. The prosecution openly admitted that it knew of Davenport's expectation; Miller testified that "[e]verybody wants something, and I'm sure Davenport wanted something." (J.A. at 476.) While the prosecution claimed that it did not make any formal promises to Davenport, it certainly fulfilled its end of the unspoken bargain, shortly after the initial meeting between the prosecution and Davenport, the district attorney's office that was prosecuting Petitioner's case dropped four criminal charges against Davenport.[5] Moreover, shortly after Petitioner's trial, the prosecutor wrote a letter to Davenport's parole board and requested early parole on behalf of Davenport. In the letter, the prosecutor explicitly noted that he was writing the letter in part because of Davenport's testimony: "Based upon [Davenport's] cooperation, ... we are requesting that William Davenport be considered for parole at the earliest eligible date."

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[5] The record also indicates that shortly after the meeting between the prosecution and Davenport, a state trial court sentenced Davenport to concurrent, as opposed to consecutive, sentences for two counts of concealing stolen property. The record, however, is unclear as to whether the district attorney's office had some influence as to the court's decision, such as a sentencing recommendation. As a result, we make no assumption as to whether the prosecution played any part in the court's favorable treatment to Davenport.

(J.A. at 501-02.) The prosecutor minced no words as to the *quid pro quo* involved with Davenport's testimony. This is abundant evidence of a tacit agreement, and this evidence should have been disclosed to Petitioner.

With respect to this tacit agreement, the district court found that Davenport did indeed approach the prosecution to testify in search of some benefit, so that this evidence should have been disclosed to Petitioner, and we agree. The district court did not mention or analyze the fact that the district attorney's office dropped four counts against Davenport; and we find a tacit agreement based on this lenient treatment, so that this information should have been disclosed. Finally, with respect to the prosecutor's letter to Davenport's parole board, the district court found that the letter could not have been disclosed to Petitioner; because the prosecutor wrote the letter after Petitioner's trial, no favorable evidence existed to be disclosed under *Brady*. While the simplicity of the district court's logic is appealing, it does not withstand closer inspection.

Taken to its logical endpoint, the district court's analysis would shield the prosecution's lenient treatment from the *Brady* rule with respect to a tacit agreement so long as the prosecution's actions took place after the petitioner's trial. The error in such a position is that *when* the prosecution makes good on the tacit agreement should not dictate whether the agreement should have been disclosed. It would be inconsistent to find a *Brady* violation when a prosecutor tacitly agrees to write a letter to the witness' parole board and does so before the petitioner's trial, but to not find such a violation with the same tacit agreement when a prosecutor writes the

letter after the petitioner's trial. If such a distinction were made, then the prosecution would just wait until the petitioner's trial ended before it provided the witness any benefits to avoid *Brady* disclosure. A tacit agreement must be disclosed regardless of when the prosecution acts upon that agreement. In short, the formation of the agreement, not the execution of the agreement, is the critical point of interest.

An argument can be made that such a rule would chill the prosecution from giving any nondisclosed benefits to a witness after trial for fear that such conduct will jeopardize the results of the trial, even if such nondisclosed benefits were not part of any agreement, express or tacit. While it is theoretically possible for the prosecution to grant a witness benefits after trial that have no connection to the witness' testimony, it is more than a fair assumption that the prosecution generally grants a witness such benefits in exchange for his testimony. The prosecution is also not in the business of altruism; it grants leniency to an informant because it wants that informant's testimony, and it wants to encourage other informants to come forward and testify. A rule requiring disclosure of a tacit agreement regardless of when the prosecution grants leniency recognizes this fact and is necessary to prevent the prosecution from shirking its *Brady* responsibilities by simply waiting until after the petitioner's trial to act on the tacit agreement. As a result, the prosecution should have disclosed its tacit agreement to assist Davenport with early release, even though this assistance took place after Petitioner's trial.

Despite Respondent's argument that the prosecution's leniency towards Davenport was

unconnected to his testimony in Petitioner's trial, it is difficult to believe as mere coincidence that shortly after Davenport met with the prosecution, the prosecution dropped two counts of grand larceny and two counts of concealing stolen property against Davenport. It is likewise difficult to believe as coincidence that shortly after the guilty verdict in Petitioner's case, the prosecutor wrote a letter on behalf of Davenport in support of Davenport's early release. These facts, coupled with Davenport's expectation of benefits and the prosecution's acknowledgment of this expectation, are ample evidence of a tacit agreement that should have been disclosed to Petitioner.

Moreover, we agree with the analysis of the Eighth Circuit and find that even absent any agreement, tacit or otherwise, impeaching or exculpatory evidence must still be disclosed to the defendant. In *Reutter*, the court found that even though there was no agreement between the prosecution and its star witness in the defendant's case, the prosecution's failure to disclose that the witness had a sentence commutation hearing after the defendant's trial constituted a *Brady* violation. 888 F.2d at 582. The key question is whether the evidence is exculpatory or impeaching. *Id.* As the dissent readily admits, the fact that Davenport was shopping to exchange his testimony for benefits was impeaching information that should have been disclosed, even absent any agreement. Petitioner could have used this evidence to demonstrate that Davenport was testifying as an interested witness. Likewise, the fact that the government dropped four criminal counts against Davenport right before Petitioner's trial was also potentially impeaching evidence. Even if there

were no agreement or *quid pro quo* between Davenport and the government with respect to this favorable treatment, Petitioner could have argued that said favorable treatment colored or biased Davenport's testimony by encouraging Davenport to testify in a manner advantageous to his benefactors. This fact therefore should have been disclosed.

ii. Suppression by the Prosecution

The district court found that the prosecution did not disclose the fact that Davenport approached the prosecution to testify against Petitioner in expectation of some benefit, and this finding is not clearly erroneous. The district court made no finding as to the disclosure of the tacit agreement with respect to the *nolle prosequied* counts against Davenport, so there is no factual finding to review under the clearly erroneous standard. From our review of the record, there is nothing that indicates that this information was disclosed to Petitioner. The district court also made no factual finding as to the disclosure of the tacit agreement to assist Davenport at his parole hearing, and we find that this information was not disclosed to Petitioner.

With respect to the element of suppression, Respondent "submits that petitioner had access to the material upon which he bases his claim, namely Davenport's parole records and prior convictions." (Resp't Br. 24.) This argument fails for two reasons. First, if Petitioner had searched Davenport's parole records and prior convictions before trial, Petitioner could not have found that Davenport approached the prosecution shopping for a deal for his testimony, that the district attorney's office dropped four counts against Davenport after a meeting with the

prosecution, or that the prosecution had a tacit agreement to provide Davenport assistance with his parole hearing. Thus, the basis of Petitioner's *Brady* claim could not have been discovered through a search of Davenport's parole records and prior convictions.

Second, and more importantly, assuming *arguendo* that the basis of Petitioner's *Brady* claim could indeed have been found in these records, Petitioner was under no obligation to second guess the prosecution's representation that no impeaching evidence existed as to Davenport. As explained above, once the prosecution responded to Petitioner's request for impeaching evidence, Petitioner was under no duty to engage in further investigation to determine whether the prosecution's response was truthful. *See Banks*, 540 U.S. at 695, 124 S.Ct. 1256 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."). The Supreme Court rejected a similar argument in *Strickler;* there, the prosecution claimed that the basis of the petitioner's *Brady* claim was contained in the prosecution's file, and that the prosecution had an "open file" policy so that the petitioner could have discovered the relevant evidence. 527 U.S. at 276, 119 S.Ct. 1936. The Supreme Court found that despite the open file policy, the prosecution suppressed the exculpatory evidence because it represented that it had produced all the *Brady* information in the file. *Id.* at 289, 119 S.Ct. 1936. Likewise, even if the basis of Petitioner's claim could have been discovered through a search of Davenport's parole records and prior convictions, Petitioner could rely on the prosecution's representation that no

exculpatory or impeaching evidence was available so as to make such a search futile.

iii. Materiality

In order to assess the materiality of the suppressed evidence, we analyze the importance of Davenport's testimony, the strength of the prosecution's remaining case, and the strength of Petitioner's defense.

(1). Davenport's Testimony

Both Petitioner and the prosecution readily admit that Davenport's testimony was critical. Davenport was the prosecution's final witness; the prosecution admitted that it did not have a strong case without Davenport's testimony. Davenport's testimony was critical in two respects: it negated Petitioner's identity defense by specifically naming Petitioner as the shooter; and it provided the only evidence as to premeditation with respect to the killing of Mrs. Wallace, as Davenport testified that Petitioner had told him that he shot Mrs. Wallace because she was a witness to the shooting of Mr. Wallace.

(2). The Prosecution's Remaining Evidence

The remaining case against Petitioner was somewhat insubstantial and entirely circumstantial. There were no eyewitnesses who could positively identify Petitioner as the shooter. The police never found the murder weapon. Laboratory results indicated that Petitioner could have fired a gun. When Petitioner was arrested, he was found with the same type of bullets used to shoot the victims. The spent cartridges at the crime scene also matched spent cartridges found at Petitioner's camp. On the other hand, laboratory results indicated that there was no blood on Petitioner's clothes.

(3). Petitioner's Defense

Petitioner's defense was also anemic. Petitioner claims that he and another man purchased .38 caliber bullets for this man's gun. Petitioner then shot the gun for target practice at his camp. Petitioner then left his camp, returned, left again, and he was then arrested.

The prosecution presented Billy Joe Camden ("Camden") as a rebuttal witness. Camden testified that he purchased .38 caliber bullets at Petitioner's request. After purchasing these bullets, Camden left Petitioner.

(4). Reasonable Probability of a Different Result

We hold that had the prosecution disclosed to Petitioner its tacit agreement with Davenport and its attendant benefits, there would have been a reasonable probability of a different result as to both Petitioner's conviction for first-degree murder and his conviction for second-degree murder. When considered cumulatively, the suppressed agreement was strong impeachment evidence of Davenport. Because of his testimony, Davenport dodged four criminal counts and secured a recommendation from the prosecutor for early release. In addition, not only did the prosecution fail to disclose this tacit agreement, but the prosecution went further and misrepresented to the jury that it had no "say-so" with Davenport's parole board. The evidence of the parole board's decision suggests otherwise; in the "Notice of Board Action," the parole board granted Davenport early release, indicating under "Final Board Action" to "see DA's letter supporting parole." (J.A. at 498.) Not only did the prosecution's letter influence the parole board's decision, it appears to have been the basis of the

board's decision. Certainly the prosecution cannot require action of the parole board, as prosecutor Miller so testified, but the actual decision of the parole board is proof positive that the prosecution does have influence with the parole board. Moreover, the fact that the parole board took heed to the prosecution's recommendation that Davenport be paroled is no novel outcome; a prosecutor may appear on behalf of a potential parolee or give similar assistance, and the parole board, while not required to act according to the wishes of the prosecutor, often takes into consideration the prosecutor's recommendation. Miller's proclamation to the jury that he had no "say-so" with the parole board was therefore misleading.

The harm from the prosecution's misrepresentation to the jury is similar to that in *Reutter*, where the Eighth Circuit found that the prosecution's statement to the jury that the witness had nothing to gain from testifying exacerbated the *Brady* violation in light of undisclosed evidence that the witness was seeking a commutation of his sentence. 888 F.2d at 582. In this case, the prosecution failed to disclose its tacit agreement to aid Davenport at his parole hearing; additionally, the prosecution then told the jury that it had no power to aid Davenport at his parole hearing, despite the fact that it could do so and did do so. In other words, the prosecution's statement bolstered Davenport's testimony by portraying Davenport as a man testifying without benefit, when in fact his testimony should have been questioned because of the actual benefits he realized therefrom. The tacit agreement, the *nolle prosequied* counts, the letter to the parole board, and the prosecution's

misrepresentation are sufficient to establish materiality.

Materiality is especially apparent in light of the prosecution's remaining evidence. With respect to first-degree murder, Davenport's testimony was the only evidence of premeditation as to the shooting of Mrs. Wallace. There is a reasonable probability that, had the jury been made aware of Davenport's agreement with the prosecution, a different result would have occurred, as proof of one of the required elements of first-degree murder would have been in doubt. With respect to Petitioner's conviction of second-degree murder of Mr. Wallace, Davenport's testimony was the strongest piece of evidence presented by the prosecution, as it positively identified Petitioner as the shooter. With the veracity of the testimony in doubt, the prosecution would have had to rely on the circumstantial evidence that Petitioner was carrying the same type of bullets that were used to kill the victims, and that spent cartridges found at the crime scene matched spent cartridges found at Petitioner's camp. The prosecution's case was also negated by the fact that no blood was found on Petitioner's clothes, and Petitioner's testimony that he fired a .38 caliber handgun that belonged to Camden at Petitioner's camp. These facts sufficiently demonstrate a reasonable probability of a different result with the impeachment of Davenport's testimony. In the words of the Supreme Court, Petitioner did not receive "a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

We emphasize that the materiality prong is not a sufficiency of the evidence test, nor is the inquiry whether Petitioner more likely than not would have

been acquitted. The question is whether the withheld evidence would have "put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S.Ct. 1555. Had the jury been made aware of Davenport's substantial interest in his testimony against Petitioner, the jury's view of the case would have been significantly colored by this impeachment evidence. Of critical importance is how Davenport's testimony interacted with the remainder of the evidence and the theory presented by the prosecution. Davenport's testimony significantly corroborated what the circumstantial evidence could only imply as to the events surrounding the shooting. Had the prosecution made available the appropriate impeaching evidence, not only would Davenport's testimony have been shrouded in doubt, his testimony's corroboration of the prosecution's theory vis-a-vis the circumstantial evidence would also have been weakened. There is simply no way to know how the jury would have viewed the remaining circumstantial evidence with Davenport's credibility placed into question, such that one cannot safely say that Petitioner received a fair trial.

Moreover, we disagree with the district court's assessment of materiality. We first note that the district court did not consider in its materiality analysis the *nolle prosequied* counts or the prosecution's letter to the parole board. It also did not consider the prosecution's misrepresentation to the jury. These facts alone demonstrate that the district court erred in its materiality analysis. Furthermore, the district court found that materiality was lacking because "Davenport's offer to testify and statements to the prosecutor were disclosed," and because "Davenport's

criminal history and his interest in parole eligibility were presented to the jury." (J.A. at 580.) We will address these points in turn. While the jury knew Davenport offered to testify, they did not know *why* Davenport offered to testify: he wanted to exchange his testimony for leniency. A witness' offer to testify is not inherently impeaching; a witness may testify for any number of reasons that do not cast doubt as to his testimony. What makes a witness' testimony suspect is an offer to testify for a self-interested motive, and complete evidence of Davenport's self-interest was never fairly presented to the jury.

With respect to Davenport's criminal history, we agree that Petitioner was afforded the opportunity to impeach Davenport with his criminal history, but this is a *non sequitur;* the fact that Petitioner was able to impeach Davenport with his criminal history does not answer his inability to impeach Davenport with other crucial evidence that Davenport had an interest in the testimony. The Supreme Court has spoken directly on this type of argument: "[W]e do not believe that the fact that the jury was apprised of *other grounds* for believing that the witness ... may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." *Napue v. Illinois*, 360 U.S. 264, 270, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (emphasis supplied). This language applies with equal force to Respondent's argument that the jury knew of Davenport's interest in parole eligibility. Again, while the jury was made aware of this interest, Davenport's interest in currying favor with the parole board was wholly separate from Davenport's interest in receiving lenient treatment from the prosecution in the form of the *nolle prosequied* counts and the

recommendation letter to the parole board. The impeachment evidence actually presented at trial does not act as a constitutional substitute for the impeachment evidence suppressed by the prosecution.

In short, Davenport's testimony was the crux of the prosecution's case as to both first- and second-degree murder. Had Davenport's testimony been properly impeached, there is a reasonable probability that the result would have been different for both of these charges.

B. THE DISTRICT COURT DID NOT ERR IN DENYING RELIEF ON THE PETITIONER'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE THAT HE LACKED THE *MENS REA* NECESSARY FOR FIRST-DEGREE PREMEDITATED MURDER.

1. Preservation of the Issue

Respondent argues that this Court may not review Petitioner's ineffective assistance of counsel claim because he failed to raise the claim before any state court. We agree.

As explained above, when a petitioner's claim is procedurally defaulted in state court, the federal courts may not review the claim on habeas review unless the petitioner shows cause and prejudice. Here, Petitioner failed to exhaust his state remedies with respect to his ineffective assistance of counsel claim. Because a state procedural rule would bar Petitioner from raising this

claim in state court, Petitioner's claim is procedurally defaulted. *See supra.*

Petitioner argues that in fact he raised the substance of his claim before a state court, so that he exhausted his state court remedies and his claim is not procedurally defaulted. We disagree. Petitioner did raise a claim of ineffective assistance of counsel in his state post-conviction hearings, but this claim was based only on two underlying claims: (1) counsel's failure to object to "and raise on appeal the admissibility of a lay opinion offered by a state's witness on the mental condition of the dying victim," *Bell v. State*, 1994 WL 406168, at *4; and (2) counsel's failure to "raise the issue as to whether a rational trier of fact could find beyond a reasonable doubt [Petitioner] was guilty of murder in the first degree absent proof of deliberation," (J.A. at 123). Petitioner never raised the underlying claim that counsel failed to investigate and present evidence of alcoholism and mental illness. In determining whether a claim has been fairly presented to the state courts, this Court looks to whether "the petitioner asserted both a factual and legal basis for his claim in state court." *Newton v. Million*, 349 F.3d 873, 877 (6th Cir.2003). In this case, Petitioner did not assert either; Petitioner never presented to the state courts the factual basis of his trial counsel's failure to investigate or present evidence of alcoholism and mental illness; likewise, Petitioner did not present the legal basis that such action was objectively deficient performance and prejudicial under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Petitioner's citation to *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), is to no avail.

That case involved a petitioner who claimed that the state systematically excluded blacks from the grand jury which eventually indicted him. *Id.* at 256, 106 S.Ct. 617. The petitioner made this claim on both direct review and state habeas review. *Id.* On federal habeas review, the district court ordered statistical evidence as to the grand jury service of blacks in the relevant county, and it also ordered the parties to present evidence of statistical significance, *i.e.*, the probability that blacks were excluded from the jury not by deliberate design but by "chance or accident alone." *Id.* at 257, 106 S.Ct. 617. The Supreme Court held that the district court could view this additional evidence without running afoul of the state exhaustion requirement despite the fact that such evidence was not presented to the state courts. *Id.* at 258, 106 S.Ct. 617. The Court found that

> the circumstances present no occasion for the Court to consider a case in which the prisoner has attempted to expedite federal review by deliberately withholding essential facts from the state courts. We hold merely that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence.

Id. at 621-22, 106 S.Ct. 617. The instant case is easily distinguishable; while the petitioner in *Hillery* was only looking to present supplemental evidence for the same claim, Petitioner here is attempting to add an entirely new underlying claim to his claim of ineffective assistance of counsel. This would work a fundamental

alteration to the legal claim already considered by state courts, so that we cannot say that the state courts had the first opportunity to review the claim. *See Coleman*, 501 U.S. at 731, 111 S.Ct. 2546 ("[I]n a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights."). The state courts were never presented with the issue of ineffective assistance of counsel due to counsel's failure to investigate and present evidence of alcoholism and mental illness, and we agree with those circuits that have held that an ineffective assistance of counsel claim based on one ground does not exhaust state court remedies with respect to an ineffective assistance of counsel claim based on another ground. *See Sweet v. Bennett*, 353 F.3d 135, 139-140 (2d Cir.2003); *Tippitt v. Lockhart*, 903 F.2d 552, 554 (8th Cir.1990); *Gibson v. Scheidemantel*, 805 F.2d 135, 139 (3d Cir.1986).

The question now is whether Petitioner has demonstrated cause and prejudice for his default, and we conclude that Petitioner has not done so. Petitioner argues that he has cause for not raising this claim before a state court, because the state courts did not provide funding for expert witnesses such as Dr. Auble. This fact does not constitute cause; even without expert witness testimony, Petitioner could have still made a viable claim as to ineffective assistance of counsel due to counsel's failure to investigate and present evidence of Petitioner's alcoholism and mental illness. Petitioner could have simply shown that there were records of his conditions sufficient to support a defense, and that counsel did not investigate and thus did not present this evidence.

Petitioner also argues that he has cause for not raising the claim before a state court because of the ineffective assistance of counsel during his state post-conviction proceedings. The problem with Petitioner's position is that attorney error can only be considered cause if the error meets the threshold of ineffective assistance of counsel in violation of the Sixth Amendment. *Coleman*, 501 U.S. at 752, 111 S.Ct. 2546 (citing *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). Petitioner, however, does not have a constitutional right to effective assistance of counsel during state collateral proceedings. *Id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)). Petitioner argues that because ineffective assistance of trial counsel is a claim that can first be brought at a state post-conviction proceeding, Petitioner is entitled to effective assistance of counsel at the post-conviction proceeding. This Court has specifically rejected that argument, finding that a petitioner must bear the risk of attorney error at such proceedings. *Abdus-Samad v. Bell*, 420 F.3d 614, 631-32 (6th Cir.2005).

With respect to prejudice, Petitioner's claim lacks merit, so that he cannot establish prejudice. *See infra.*

2. Standard of Review

When a district court denies a habeas petition, this Court reviews its legal conclusions *de novo* and its factual conclusions for clear error. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir.1999).

Because Petitioner filed his habeas petition prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the pre-AEDPA standard of review applies with respect to the

conclusions of the state courts. Under this standard, the Court "presume[s] the correctness of the state court factual findings, unless rebutted by clear and convincing evidence, and [it] review[s] determinations of law, or mixed questions of fact and law, *de novo.*" *Smith v. Mitchell*, 348 F.3d 177, 198 (6th Cir.2004) (citations omitted).

3. Analysis

While we find that Petitioner's claim is procedurally barred, we also note that Petitioner's claim lacks merit. Petitioner's trial counsel conducted a reasonable investigation as to Petitioner's alcoholism and mental health, and Petitioner was the party ultimately responsible for deciding against presenting evidence of Petitioner's alcoholism and mental health.

a. Legal Framework

Under *Strickland v. Washington*, a petitioner may establish a claim of ineffective assistance of counsel if he shows that: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense in that there is a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. 466 U.S. at 687-88, 694, 104 S.Ct. 2052.

Under *Strickland*, trial counsel has a duty to investigate his case:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be

> critical to a proper assessment of counsel's other litigation decisions.

Id. at 690-91, 104 S.Ct. 2052.

b. Application to This Case

Petitioner's counsel conducted reasonable investigations into Petitioner's alcoholism and mental health. Counsel requested an initial mental health evaluation of Petitioner due to Petitioner's admitted substance abuse problems and his blackouts on the day of the crime. Counsel also conducted an initial investigation as to Petitioner's alcoholism, unearthing records from various mental health and medical facilities. Counsel believed that Petitioner's best defense was an intoxication defense, but Petitioner insisted on a defense of identity. This was true even after counsel explained to Petitioner other available defenses.

At that point, counsel's failure to further investigate Petitioner's alcoholism and mental health was completely reasonable, as Petitioner effectively told him to stop investigating these defenses, because Petitioner's defense of choice was identity. To reiterate the words of the Supreme Court, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 690, 104 S.Ct. 2052. Petitioner made a strategic decision to pursue an identity defense at trial, even though trial counsel believed intoxication was the best defense. Petitioner cannot now rest the blame of that strategic decision on the shoulders of his

counsel; his counsel rightfully halted the investigation into Petitioner's alcoholism and mental health at Petitioner's request.

The point is that counsel must make reasonable investigations into all potential defenses, or have a reasonable explanation why such investigation would be unnecessary, and counsel must present these defenses so Petitioner could make an informed decision: "A good lawyer tries to persuade the accused to make a wise decision about ... presenting a defense, *even though the ultimate decision rests with the client,* and wretched advice that leads the accused to make a bad decision is a form of ineffective assistance. The accused is entitled to the information essential to make an educated choice." *Wallace v. Davis*, 362 F.3d 914, 920 (7th Cir.2004) (emphasis supplied). Here, counsel made a reasonable investigation into Petitioner's mental health and alcoholism, and he told Petitioner that he thought an intoxication defense was Petitioner's best choice. Petitioner's decision to forego this defense and to pursue a defense of identity was thus informed, so that Petitioner cannot claim ineffective assistance on the part of his counsel. As the Second Circuit recently observed, "[T]o the extent that defendant instructed his counsel to pursue a course of action that defendant now complains of, there was no abridgement . . . of defendant's Sixth Amendment right to effective assistance of counsel." *United States v. Wellington*, 417 F.3d 284, 289 (2d Cir.2005). *See also Stano v. Dugger*, 921 F.2d 1125, 1151 (11th Cir.1991) ("When a defendant preempts his attorney's defense strategy, he thereafter cannot claim ineffective assistance of counsel." (citation omitted)); *Alvord v. Wainwright*, 725 F.2d 1282, 1288-89 (11th Cir.1984)

(holding that counsel's failure to present an insanity defense was not ineffective assistance when the defendant refused to allow an insanity defense and insisted on relying upon a weak alibi).

Petitioner's related claim that his counsel failed to present a complete defense[6] is also meritless and warrants only a few brief words. A defense of identity and a defense of intoxication are inconsistent. *See, e.g., Jackson v. Shanks*, 143 F.3d 1313, 1320 (10th Cir.1998) ("Pursuing a diminished capacity defense would have been inconsistent with [the petitioner's] complete denial of involvement in the robbery."). Petitioner could not have successfully argued that he did not shoot the victims, but if he did, he was drunk and did not remember. Petitioner chose the defense of identity, and his counsel provided a complete defense under that chosen strategy.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the order of the district court and **GRANT** the petition for writ of habeas corpus. The district court shall enter an order requiring Petitioner to be released from custody unless the State of Tennessee commences a new guilt phase trial within 180 days of the district court's order.

JULIA SMITH GIBBONS, Circuit Judge, Concurring in Part and Dissenting in Part.

I concur in the majority opinion as to Bell's ineffective assistance of counsel claim, but disagree with the majority's disposition of Bell's *Brady* claim. The majority holds that the prosecutor had a "tacit

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[6] This statement is made in Petitioner's Statement of Issues but is not explained in the substance of Petitioner's Brief. We will nevertheless address the point, as it can be disposed of easily.

understanding" with the witness and was required to disclose this agreement to the defense under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), even though no probative evidence of such an agreement exists.

Bell relies on three pieces of evidence in support of his *Brady* claim. All are related to the testimony of William Davenport, a convicted felon who was held with Bell in the Nashville jail. Davenport approached Ross Miller, Bell's prosecutor, seeking either a transfer of facilities or participation in a work-release program. This request, which was recorded in Miller's notes, was not divulged to the defense as required by *Brady*. Second, prior to Bell's trial, several of Davenport's pending counts were *nolle prosequied* by another prosecutor as part of a plea bargain that resulted in a three-year sentence for Davenport on other counts in his indictment. The defense was not informed of the outcome of Davenport's case. Third, Miller sent a letter to the parole board on Davenport's behalf after the trial ended, recommending parole "at the earliest possible date." Davenport was, in fact, granted early parole. The only undisclosed material at the time of trial was thus Miller's notes and Davenport's sentencing documents.

The majority holds that the prosecution was required to disclose the first two pieces of cited evidence and that all three pieces of evidence were sufficient to prove the existence of a wrongfully-suppressed, implied agreement with Davenport to grant him benefits in exchange for his testimony. Further, the majority holds that the parole letter—or at least the prosecution's agreement to write such a letter—was wrongfully withheld because it was a

tangible result of this purported tacit agreement. The evidence in this case, however, does not support a determination that the prosecution entered into a tacit agreement with Bell. In addition, while Miller should have disclosed the notes regarding Davenport's request for a transfer and Davenport's sentencing documents,[1] this evidence is not material, so the prosecution's suppression of it did not violate *Brady*.

I.

I first consider the majority's reasoning regarding the purported tacit agreement between the prosecution and Davenport. The majority is certainly correct that the prosecution must divulge an express agreement with a witness in relation to that witness's testimony, regardless of whether the agreement is written or oral. *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In its opinion, however, the majority extends *Giglio*'s holding to encompass a situation where a witness merely hoped for a future benefit and received one. In so doing, it mischaracterizes the hope and the benefit as an agreement and mischaracterizes our sister circuits' precedent.

Beginning with the majority's finding of an agreement, a primary component of its faulty reasoning is its speculation that Davenport's plea bargain and sentencing prior to Bell's trial had a

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[1] Both items were required to be disclosed as impeachment material. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ("Impeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule."). The notes of the transfer request were evidence that Davenport hoped for favorable treatment for his testimony. The sentencing documents reflected Davenport's prior criminal convictions.

connection to Davenport's testimony. Yet no evidence supports such a connection. No evidence permits an inference that either the prosecutor or judge in Davenport's case knew that Davenport had approached Miller or that Miller anticipated that Davenport would testify for the state at Bell's trial. The reality of this record is that Davenport asked for the benefit of a transfer or participation in work release and probably hoped that some other favorable treatment might come his way as a result of his testimony. Davenport's more general hopes were realized when Miller recommended an early parole after Bell's trial, although his specific requests were not granted. There is nothing more. Miller denied any agreements with Davenport or any promises to him.

The majority also goes astray in relying on three cases to support its inference of a tacit agreement between a witness and the prosecutor based on lenient treatment of the witness. *See Wisehart v. Davis*, 408 F.3d 321 (7th Cir.2005); *Reutter v. Solem*, 888 F.2d 578 (8th Cir.1989); *United States v. Shaffer*, 789 F.2d 682 (9th Cir.1986). While the majority is correct to find some support in these cases for the proposition that implied agreements must be disclosed, none of the cases supports the majority's ultimate conclusion.

The Seventh Circuit noted in *Wisehart* that an implied agreement must be disclosed, 408 F.3d at 324, but that court expressly declined to find such an agreement based solely on a testifying witness's lenient treatment in a plea bargain. *Id.* at 325. Instead, the court *denied* Wisehart's *Brady* claim for several reasons. First, the court noted the difficulty in determining when a "tacit agreement" existed; the commonplace nature of plea bargaining—and the

leniency inherent in and necessary to the bargaining process—would require intense scrutiny of all witnesses and would imply agreement in nearly all similar cases. *Id.* Second, the court noted the minimal impeachment value of such leniency once charging practices were explained to the jury. *Id.* The fact that Johnson expected to benefit by his testimony was immaterial: "A criminal trial must not be allowed to turn into an inquiry into disparate treatment of criminals, with the witness being asked whether he'd received any benefit that he would not have received had the state not wanted his testimony and whether therefore he feared retaliation if he stopped playing ball." *Id.* at 325-26. The holding in *Wisehart* was squarely in line with Seventh Circuit precedent. In *Todd v. Schomig*, a prior Seventh Circuit panel rejected a similar claim where a witness had an "expectation of benefit" from his testimony, concluding that "[w]ithout an agreement, no evidence was suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation." 283 F.3d 842, 849 (7th Cir.2002).

The majority opinion also considers and rejects the Second Circuit's ruling in *Shabazz v. Artuz*, 336 F.3d 154 (2d Cir.2003), which reached the same result. In that case, the court denied a claim for disclosure of an implied agreement where, as is the case here, the prosecutor testified that no agreement existed even though the witnesses' own trials were postponed and the witnesses received lenient treatment in sentencing after testifying. The court rejected this evidence of an implied agreement even though it found "inescapable" the conclusion that the lenient treatment was related to the testimony. *Id.* at 165. The court reasoned that

"[t]he government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony." *Id.* (emphasis in original).

Unlike *Wisehart* and *Shabazz*, the *Shaffer* court did find an implied agreement between the prosecutor and witness. It is similarly unhelpful as support for the majority's position, however, because the facts are quire different from this case. The court in *Shaffer* determined that a tacit agreement existed between the prosecution and the witness in light of extensive evidence showing that the witness, a co-conspirator in a heroin transaction, received financial benefits from the government in connection with the transaction, escaped asset forfeiture proceedings related to the transactions, and was allowed to escape liability for tax violations despite a representation by the government in court that it would require the witness to pay the taxes. 789 F.2d at 689. The benefits to the witness were thus unusual, and the prosecutor did not specifically deny an agreement.

Finally, in *Reutter*, the prosecutor was one of three members of the parole board that was scheduled to hear the witness's commutation petition. The witness's hearing was delayed several times without reason and eventually occurred immediately after trial. The parole board granted the commutation petition. The court argued that had the defense been apprised of the rescheduling of the commutation hearing, the defense would have been able to mount a more effective challenge to the witness's credibility. The court therefore found the suppression of this evidence to be

material, especially in light of the prosecutor's explicit representation to the jury that the witness could not benefit from his testimony. 888 F.2d at 581-82. Thus, the *Reutter* court did find a *Brady* violation. It expressly declined to rely on—or even discuss in any depth—a finding that the prosecutor and witness had an implied agreement, 888 F.2d at 582 ("Our conclusion does not depend on a finding of either an express or an implied agreement . . ."), and upheld the district court's determination that no such agreement existed. *Id.* The *Reutter* court's holding, rather, relied solely on the independent materiality of the suppressed information. That is, the non-disclosed facts were so suspicious as to render an implied agreement finding duplicative and therefore unnecessary. As a result, *Reutter* has no bearing on the implied agreement question raised here.

The holdings in *Wisehart* and *Shabazz* are well-reasoned. When applied to this case, they highlight why the evidence in this case is insufficient to support the finding of an implied agreement between Miller and Davenport. First, as in *Shabazz*, Miller expressly testified that he had reached no such agreement. Miller specifically stated at the evidentiary hearing in this case that, "*I didn't promise Davenport anything, and I didn't make any agreements with him*, but he testified at trial against someone I thought was dangerous, and I felt that he would now be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison, whenever the parole board thought would be eligible."

Second, the treatment of Davenport was well within the range of normal prosecutorial behavior. The *nolle prosequied* counts were part of a plea agreement that was completed prior to Davenport's testimony.

Given the joint incentives to defer such charging decisions until after the testimony when the testimony is a condition of leniency, *see Shabazz*, 336 F.3d at 163, the timing of the plea here could actually suggests that the parties had *no* agreement regarding those charges.

Third, though the prosecutor's letter to the parole board is evidence of a benefit given by Miller to Davenport, such benefits are common and are not necessarily the result of an agreement between the prosecution and the witness prior to testimony. There are other reasons for such a letter; here, Miller testified that he recommended leniency in part due to concern that Davenport would be targeted by other inmates as a "snitch" due to his testimony in Bell's case. The ambiguity of purpose behind the parole letter minimizes its usefulness in determining whether an implied agreement existed prior to trial. As the *Shabazz* court noted, the government is *permitted* to reward witnesses for their testimony.

The result of the majority's dual error of mischaracterizing the evidence and the precedent is an expansion of the definition of *Brady* violation to include nondisclosures of witness treatment never previously considered by any court to be within *Brady*'s ambit. When the majority asserts that denying Bell relief here would "leave[] little room for a petitioner to establish a tacit agreement," it simply overlooks the fact there are many fact patterns, as in *Shaffer*, that may provide a proper basis for finding a tacit agreement. Now, the majority's result leaves little room for finding no agreement, even when the evidence fails to support its existence. Like the *Shabazz* court, I would hold that "favorable treatment to a government witness, standing alone, does not establish the existence of an

underlying promise of leniency in exchange for testimony." 336 F.3d at 165.

II.

Although Miller did not violate *Brady* in failing to disclose a tacit agreement, he did not disclose the notes from his meeting with Davenport and Davenport's sentencing documents,[2] both of which could have been used for impeachment. Thus, the failure to disclose them was contrary to the requirements of *Brady* and its progeny. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The inquiry then is whether the undisclosed evidence is sufficiently material to constitute constitutional error. *See Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The Supreme Court has held that evidence is material when disclosure of the suppressed evidence would create a reasonable probability of a different result. *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375. I conclude that the suppressed evidence here is insufficient to create a reasonable probability of a different result because its impeachment value is minimal and because defense counsel Ross Alderman effectively impeached Davenport's credibility at trial.

At Bell's trial, Davenport testified that Bell admitted committing the murders. Alderman attacked Davenport's testimony on cross-examination, arguing that Davenport was an incredible witness due to his prior criminal history, his prior membership in the Ku Klux Klan, and the fact that he might receive early parole in exchange for his testimony. In his closing

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[2] The parole letter was not created until after trial, and therefore could not be disclosed absent an implied agreement.

argument, Alderman again noted Davenport's criminal and parole status:

> [Y]ou have got to decide whether you want to believe somebody who was on parole, violated that parole, was in jail, all this involving a crime involving fraud and false dealings, theft .... I [Davenport] want you to believe [my testimony] ... because I have got a parole hearing coming up in a matter of months and if I can go to the Parole Board and I can say, 'I have helped convict Stephen Michael Bell,' that they might cut me some slack because they violated my last parole when I committed another crime .... That is why I called the District Attorney's office; that is why I spoke to the police and the District Attorney and that is why I came to testify, but you believe me.

The documentary evidence of Davenport's guilty plea and request for facility transfer in connection with his testimony might have bolstered Bell's credibility argument, but the benefit thus accrued would have been minimal. *See Wisehart*, 408 F.3d at 325. Further, the suppressed evidence would not have allowed Bell to develop any new or different lines of argument or testimony. Given Alderman's cross-examination of the witness based on the parole issue and his argument at closing, disclosure of the withheld *Brady* material could not "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

For the foregoing reasons, I would affirm the decision of the district court and deny Bell's petition for a writ of habeas corpus.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN M. BELL, Petitioner-Appellant,

v.

RICKY BELL, WARDEN, Respondent-Appellee.

No. 04-5523

Filed: December 15, 2006

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

OPINION

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. *Sixth Circuit Rule 35(a)* provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.

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(3)

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JUL 31 2008
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No. 07-1506

In the Supreme Court of the United States

STEPHEN M. BELL,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether evidence has been "suppressed" under *Brady v. Maryland*[1] where the evidence the government has been charged with failing to disclose was available in a public record that the defendant had every reason to review.

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[1] 373 U.S. 83 (1963)

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OPINIONS BELOW

The January 4, 2008, en banc opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the district court judgment denying habeas relief, is reported at 512 F.3d 223. (Pet.App. 1a) The August 25, 2006, panel opinion of the Sixth Circuit, which was subsequently vacated upon the grant of rehearing en banc, is reported at 460 F.3d 739. (Pet.App. 80a) The December 15, 2006, order of the Sixth Circuit granting rehearing en banc is unreported. (Pet.App. 140a) The order and memorandum opinion of the district court denying the petition for a writ of habeas corpus is unreported. (Pet.App. 58a)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner was convicted in 1987 of the shooting deaths of Herman Harrison Wallace and his wife, Jean Lynn Wallace, on September 6, 1986. He was sentenced to life imprisonment. The opinion of the Tennessee Court of Criminal Appeals on petitioner's direct appeal accurately summarizes the evidence presented at trial:

> The victims, Herman Harrison Wallace, a/k/a Mad Dog, and his wife, Jean Lynn Wallace, were street people who camped under the bridges along the Cumberland River. The

defendant, Michael Bell, a/k/a Monk, a street person, camped between the Wallaces and Nashville's Riverfront Park.

Ronald Harrington, a street person, met the defendant on the railroad tracks near the camp sites on September 6, at approximately 3:00 p.m. Defendant was shirtless, wearing Levi's, a pair of shoes or boots and had a gun in his hand. Chained to his belt, was a billfold similar to that carried by truck drivers. The gun was either a .32 or .38 caliber revolver. Defendant appeared to be under the influence and stated that he had been "coking". During this exchange the defendant asked Mr. and Mrs. Harrington to take care of his dog if anything happened to him.

Edward Stansbury, an admitted alcoholic, testified that he spent the night of September 5, 1986, with friends on the river. The next morning he left but returned to the camp of Gary Hedges in the afternoon. At approximately 4:30 p.m. they noticed a man come up a path with a shiny black dog on a leash. The leash was a choker chain with a leather belt. When the man got to within twenty feet he spoke identifying himself as "Monk" and inquiring if "Mad Dog" and Jean were home. He walked down to the Wallaces' tent and entered. Up to this point he, Stansbury, had no reason to commit to memory the man's clothing or facial features.

As Stansbury and Hedges continued to sit they heard the sounds of dogs fighting and people arguing in the Wallaces' camp, then they heard a muffled shot. Jean Wallace ran out of the tent screaming "He has killed my dog, he has killed my dog". She turned and re-entered the tent. Stansbury heard a distinctive gun shot and saw Jean Wallace backing out of the tent. As she cleared the entrance she fell and there were two more shots. He was sure he had seen the man fire the last shot. The man had been right behind Mrs. Wallace at the entrance. The man left the tent and left the scene. As the man was leaving he attempted to reload his pistol.

. . .

At a line-up conducted near the crime scene in the fading evening light, Stansbury was hesitant to identify the man in the number two spot. He was certain as to the man's jeans and nearby dog. While testifying he said he was still confused about the man's beard; he thought the culprit had short dark hair, but everything else about the number two man, the defendant, "fit to a tee".

Robert Moore, a Metropolitan Police Department homicide officer, arrived at the Wallaces' camp. He viewed the body of Mrs. Wallace and was directed to four shell casings that were lying on the ground. The soil in the area was fairly loose and the shell casings, covered with a chalky gray substance, were on top of the soil. Upon closer examination he was able to detect the smell of gun powder.

Officer Moore was advised that Mr. Wallace had been moved to General Hospital and although he appeared to have been shot as many as three times, only one slug had been found at the hospital. The officers at the crime scene made an extensive search and were able to recover a slug from the bloody mattress within the tent where Mr. Wallace had lain when shot.

. . .

Officer Mark Wynn and two other officers responded to a call that a man fitting the description of the suspect was believed to be in the area of Fessler's Lane and Hermitage Avenue. They observed the suspect sitting on the curb and drinking a beer. He had a dog with him. He was taken in custody and found to have six unspent .38 caliber Special Winchester 158 grain bullets in his pants pockets, but no weapon was found. He was concerned about the dog so the officers agreed to transport the dog to the place of the line-up. (A picture of the dog wearing the choke chain and belt leash was shown the jury.)

Sergeant Tommy Jacobs testified that shortly after 5:30 p.m., September 6, 1986, he visited the camp site of the defendant and recovered eleven spent .38 caliber shell casings and a Winchester ammunition box that were lying on the ground. A holster was also recovered at the camp site. Later at the police station Sergeant Jacobs read the defendant his Miranda rights. When told he would be charged

with murder, the defendant responded that he had not shot anyone, had not shot a gun and had never shot a gun.

Officer Darryl Ryan performed a nitric acid test on the defendant's hands. The swabs were sent to the crime laboratory.

Officer Archie Spain was sent to General Hospital. He took possession of a .38 caliber slug that was laying beside Mr. Wallace's body in the emergency room.

The State introduced testimony from three laboratory technicians. The first technician had examined the defendant's clothing for blood stains but found none. The second technician, a criminalist, had examined the swabs from the defendant's hands for gunshot residue. This technician testified that "antimonium, barium and lead indicative of gunshot residue was found in significant concentrations on exhibit 5, hand swabs. These results indicate that the subject could have fired or handled a gun."

The third technician was a firearm examiner. He identified the two lead slugs filed earlier as exhibits as being fired from the same firearm. He had disassembled one of the live cartridges taken from the defendant's pockets to compare the lead to the other lead slugs. He was of the opinion the three were from the same manufacturer. The eleven spent shells taken from defendant's camp site were compared with the four spent shells recovered at the victims'

> camp site. Based upon his microscopic examination he was of the opinion they all had been fired from the same firearm.

State v. Stephen Michael Bell, 1989 WL 86583 (Tenn. Crim. App. Aug. 4, 1989).

Although not reflected in the state court's summary of the evidence, William Davenport, a state prisoner then serving a sentence, testified that he shared a cell with petitioner at the Nashville Jail in September 1986 when Davenport was brought in to face pending charges.[2] (C.A.J.App. 256) Davenport explained that, in the course of a conversation, petitioner talked to him about the double murder with which he had been charged, telling Davenport why he had killed each of the two victims. (C.A.J.App. 256-257)

Ross Alderman, petitioner's trial counsel, filed a discovery request in petitioner's case, in which he requested exculpatory material relating to any agreement between the prosecution and any witness expected to testify at trial. (C.A.J.App. 439-441) Alderman testified in federal court that he could not recall whether he obtained any information from the prosecution in response to this discovery request. (C.A.J.App. 443) He was unsure whether he knew specifically that Davenport had been charged with concealing stolen property in August 1986, although he admitted that he "probably knew" why Davenport was in custody at the time of petitioner's trial. (C.A.J.App.

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[2] Petitioner was facing the double murder charges in this case at the time.

443) He also testified that he "may well have known" Davenport received concurrent sentences for his 1986 Davidson County convictions, but he could not specifically recall. (C.A.J.App. 444) Alderman noted that he did not get any information from the prosecution regarding Davenport's parole eligibility or his convictions and charges but that, if he had obtained this information, he would have used it to impeach Davenport's testimony. (C.A.J.App. 443, 446-447, 453)

On cross-examination, Alderman admitted he argued to the jury that Davenport's motivation for testifying against the petitioner was that he had an upcoming parole hearing and that, if Davenport helped convict the petitioner, the parole board might "cut him some slack." (C.A.J.App. 460) Alderman also stated that Davenport was cross-examined about his five prior felony convictions and the fact that he had an upcoming parole hearing. (C.A.J.App. 460-462)

Ronald Miller, the district attorney who prosecuted the petitioner,[3] testified that, sometime prior to trial, Davenport contacted the District Attorney's Office by letter. (C.A.J.App. 476) As a result of this letter, Miller met with Davenport twice before the petitioner's trial. (C.A.J.App. 476-477) Miller unequivocally stated that he did not promise Davenport anything in exchange for his testimony against the petitioner. (C.A.J.App. 471, 474)

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[3] Miller has since left the district attorney's office. He is now an administrative law judge for the Social Security Administration. (C.A.J.App. 470)

Miller admitted that, three weeks after the petitioner's trial, he wrote a letter to the parole board asking that Davenport be released at the earliest eligible date. (C.A.J.App. 480-481) Miller explained that he wrote the letter because Davenport testified against the petitioner, who was dangerous, and he was concerned that Davenport would be labeled as a snitch. Miller noted that he did not promise Davenport he would write the letter and that he could not have personally granted the petitioner parole even if he wanted to. (C.A.J.App. 475-476)

Miller also stated in that letter that the prosecution would not have had a strong case against the petitioner without Davenport's testimony. (C.A.J.App. 484) Miller explained that Davenport's testimony was helpful because it established the petitioner's motive for the killings and what actually occurred at the time of the shooting. He noted, however, that the case against the petitioner would have gone forward even without Davenport's testimony and that he believed he would have obtained a conviction without this testimony. (C.A.J.App. 483)

After petitioner's conviction was affirmed on direct appeal and he had been denied state post-conviction relief, petitioner sought federal habeas corpus relief, claiming, *inter alia*, that the state had unconstitutionally withheld impeachment evidence relating to William Davenport. Specifically, petitioner claimed that the state had failed to disclose evidence of the prosecutor's pre-trial meeting with Davenport, the disposition of some pending charges against Davenport, and the letter to the parole board, all of which, petitioner asserted, showed that the state had

failed to disclose an agreement it had made to provide Davenport with benefits in exchange for his testimony. The district court denied the claim; it found that the prosecutor's letter to the parole board could not have been disclosed because the decision to write it had been made after trial, and it concluded that the pre-trial meeting with Davenport was not material in light of the evidence that was presented at trial. (Pet.App. 78a)

A divided, three-judge panel of the Sixth Circuit reversed the judgment (Pet.App. 80a), but rehearing en banc was subsequently granted, and this opinion was vacated. (Pet.App. 140a) In a split, en banc decision, the Sixth Circuit affirmed the denial of habeas relief. The eight-member majority held that there was no *Brady* violation. While the court acknowledged that both an express and tacit agreement between the government and a witness must be disclosed, it concluded that petitioner had not adequately demonstrated the existence of any such agreement between Davenport and the prosecution. (Pet.App. 20a) The court further held that there was no *Brady* violation in the government's failure to disclose Davenport's sentencing records, because petitioner knew that Davenport had pending charges and the sentencing records were publicly available. (Pet.App. 21a) Lastly, while the court concluded that the notes of the prosecutor's pre-trial meeting with Davenport should have been disclosed, there was no *Brady* violation because they were not material in light of the other evidence and argument presented at trial. (Pet.App. 26a) Petitioner now seeks this Court's review.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

In support of his bid for certiorari, petitioner asserts that the decision of the Sixth Circuit with regard to the allegedly withheld sentencing records "cannot be reconciled with this Court's decisions in *Strickler* [*v. Greene*, 527 U.S. 263 (1999),] and in *Banks* [*v. Dretke*, 540 U.S. 668 (2004)]." (Pet. 13) But this is simply not so. Indeed, the Sixth Circuit expressly considered, and distinguished, both of these decisions. The basis for the holding of the Sixth Circuit in this case is neither akin to the arguments advanced by the government in *Strickler* and *Banks*, nor inconsistent with this Court's reasons for rejecting those arguments. And the reasonable reliance placed by the defendants in those cases on affirmative representations made by the government does not exist in this case.

In *Strickler*, the habeas petitioner alleged that the state had violated *Brady* by withholding impeaching evidence relating to the state's main witness, which consisted of police interview notes and letters sent to the police by the witness. 527 U.S. at 273. Noting that the petitioner's claim was procedurally defaulted, the Court proceeded to determine whether that default was excused by an adequate showing of cause and prejudice. The Court went on to hold that the petitioner had established cause for failing to raise his *Brady* claim because (1) the prosecution suppressed the evidence; (2) the petitioner reasonably relied on the

prosecution's open file policy as fulfilling its duty to disclose under *Brady*; and (3) the prosecution affirmatively confirmed such reliance during state habeas proceedings. *Strickler*, 527 U.S. at 289.

In *Banks*, the habeas petitioner likewise alleged that the state had violated *Brady* by withholding impeaching evidence relating to the state's main witnesses — information that one witness was a paid police informant and a transcript showing that the other witness' testimony had been previously coached. 540 U.S. at 675. While the petitioner had presented the claim in state court, he nevertheless needed to demonstrate cause for his failure to develop the facts of that claim in state court in order to secure an evidentiary hearing in federal court. Noting that its determination of this "cause" question was informed by *Strickler*, the Court concluded that "[t]his case is congruent with *Strickler* in all three respects." First, the evidence and information was suppressed; second, the petitioner reasonably relied on the prosecution's representation that it would disclose all *Brady* material; and third, the state "confirmed" such reliance in state habeas proceedings. 540 U.S. at 693.

In both cases, with respect to the "reasonable reliance" factor, the Court rejected the state's argument that the petitioner could have obtained the evidence by investigating himself and that, by failing to do so, he failed to exercise due diligence in pursuing his claim. In *Strickler*, the state asserted that the petitioner must have known about the witness' multiple police interviews and that diligent counsel could have obtained an order from the state court to produce the police files. 527 U.S. at 284-285. In

Banks, the state asserted that the petitioner failed to locate the witness and failed to interview the investigating officers in order to ascertain his true status. In both instances, the Court found the arguments unpersuasive in light of the representations that had been made by the state. 540 U.S. at 694-695. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695; *see Strickler*, 527 U.S. at 285-287.

The decision of the Sixth Circuit in this case differs markedly in two material respects — both noted by the Sixth Circuit majority.[4] First, "[n]either [*Strickler* nor *Banks*] involves information remotely similar to the public sentencing records not given to the defense in this case. Rather, both involve information known to investigating officers that defendants had no reason to know about and that could not have been discovered by defendants without an extensive and possibly fruitless investigation." (Pet.App. 22a) In other words, both cases involved information known only by the prosecution that was hidden or concealed from the defendant. In contrast, the information at issue in this

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[4] These two differences are in addition to the obvious difference, namely, that both *Strickler* and *Banks* involved the cause and prejudice analysis for a *Brady* claim, while the Sixth Circuit decision involved a merits analysis of a *Brady* claim. But because the cause analysis "corresponds" to the suppression analysis, *Banks*, 540 U.S. at 691, and because this Court has intimated that suppression alone *might* suffice to establish cause, *id.*, 540 U.S. at 693 n.13, respondent dispenses with any discussion of this distinction.

case "was a matter of public record" — in the very courthouse in which petitioner's own case was being prosecuted (C.A.J.App. 490-497); it was thus readily available to petitioner without any investigation whatsoever. *See Matthews v. Ishee*, 486 F.3d 883, 890 (6th Cir.), *cert. denied*, 128 S.Ct. 613 (2007) (contrasting case where allegedly withheld impeachment information was public information "with those cases when the government has sole possession of investigative notes or memoranda").[5] *See also United States v. Agurs*, 427 U.S. 97, 109 (1976) (prosecutors are "under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses") (quoting *In re Imbler*, 387 P.2d 6, 14 (Cal. 1963)). With petitioner having had ready access to this information prior to trial, it cannot be said that the state engaged in the "hide and seek" game-playing condemned by this Court in *Banks*. *See* 540 U.S. at 696.

Second, given the kind of evidence involved in both *Strickler* and *Banks* and the lack of any reason for the defendants in those cases to have known about its existence, this Court "readily concluded that Strickler and Banks had shown cause . . . because they had reasonably relied on the prosecutor's open file policy and assertions during state proceedings that everything known to the government had been disclosed." (Pet.App. 23a) In contrast, not only were the sentencing records in this case available to

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[5] The question on which this Court denied certiorari in *Matthews* was nearly identical to the one presented in this case. *See Matthews v. Ishee*, No. 07-5741 (U.S.).

petitioner, but "because Davenport's testimony derived from statements [petitioner] made to him while they were in jail together, [petitioner] easily could have pursued any pending charges against Davenport and their disposition." (Pet.App. 21a) "[I]n this case the known fact of Davenport's incarceration strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file." (Pet.App. 24a) *See Matthews*, 486 F.3d at 891 ("Matthews's failure to check the public records after being put on notice was his own failure . . . ."). *Cf. United States v. Pelullo*, 399 F.3d 197, 213 (3d Cir. 2005) ("[D]efense counsel's knowledge of, and access to, evidence may be nullified when a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant.") Indeed, petitioner not only knew that Davenport was incarcerated, he "probably knew why." (C.A.J.App. 444)[6] As the Sixth Circuit concluded, "[t]he absence of

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[6] At the federal evidentiary hearing, petitioner's trial counsel testified, "I knew he [Davenport] was in custody, so I probably knew why he was in custody." When specifically asked whether he knew about Davenport's concurrent sentences, he stated, "I may well have known what his sentence was when he testified in 1987 . . . ." When asked whether he knew that Davenport had charges "nolled," counsel stated, "I don't recall whether I did or not." (C.A.J.App. 444) The trial record supports the conclusion that counsel did know about Davenport's concurrent sentences: the prior convictions on which Davenport was cross-examined at trial included a 1986 conviction in Davidson County for concealing stolen property, and the first indictment on which Davenport received a concurrent sentence in November 1986 was for concealing stolen property. (C.A.J.App. 260, 492-494)

reasonable reliance distinguishes this case from *Strickler* and *Banks*." (Pet.App. 25a)

Moreover, petitioner's trial counsel expressly disavowed reliance on the representation of the prosecutor for production of the witness' sentencing records. When asked at the federal evidentiary hearing whether he had "any reason to believe that the pending charges and convictions wouldn't be turned over to [him]," counsel stated, "It would not have surprised me if the DA's position was that *the local record was accessible to me. . . .* " (C.A.J.App. 445) (emphasis added) Not only, therefore, did petitioner not rely on the state's representation for production of the information he alleges was withheld, but his own counsel admitted that it was reasonable for the prosecution to expect that petitioner would obtain this information on his own. There was not only no reasonable reliance in this case; there was no reliance whatsoever.

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

Petitioner also asserts that there is a vast "eleven-circuit split" of authority on the question presented in this case and that this is yet another reason for the Court to review the Sixth Circuit decision. But petitioner's assertion suffers from two fundamental flaws. First, he vastly overstates the dimension of any such split. Second, to the extent there exists a difference of opinion among the circuits, it is not on the question presented by this case.

A. The Claimed "Eleven-Circuit Split" Is Illusory.

Petitioner says that the holding of the Sixth Circuit in this case is followed by the First, Second, Third, Seventh, Eighth, and Eleventh Circuits. Be that as it may,[7] petitioner's corresponding assertion that the Fourth, Fifth, Ninth, and Tenth Circuits have "squarely held" to the contrary is erroneous. Petitioner relies for his claim on unpublished decisions and on dicta; he also ignores published decisions that directly refute his contention. He is wrong, therefore, to say that there is a "mature and entrenched" conflict (Pet. 27); he is also wrong to say that he "would have received habeas relief if his case had arisen in at least four . . . circuits." (Pet. 13)

Petitioner bases his assertion that the Sixth Circuit decision conflicts with the law in the Fourth Circuit on the unpublished decision in *Walker v. Kelly*, 195 Fed.Appx. 169 (4th Cir. 2006). But petitioner himself admits that published Fourth Circuit authority is in line with the Sixth Circuit. *See, e.g., Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir. 1995); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) (*Brady* rule does not apply if the evidence is available to the defendant from other sources). *See also Lovitt v.*

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[7] The cases petitioner cites from these circuits are certainly not inconsistent with the decision of the Sixth Circuit in this case, but only three — *United States v. Rodriguez*, 162 F.3d 135 (1st Cir. 1998); *United States v. Payne*, 63 F.3d 1200 (2d Cir. 1995); and *Lugo v. Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) — can be said to have implicated the fact that the allegedly withheld evidence was publicly available.

True, 403 F.3d 171, 184 (4th Cir. 2005) (quoting *Wilson* with approval). And while petitioner points to the decision in *Walker* as evidence that the Fourth Circuit "used to apply the Sixth Circuit's rule, but no longer does" (Pet. 23), less than a month before the unpublished decision in *Walker*, a different panel of the Fourth Circuit issued another unpublished decision in which it found no merit to a *Brady* claim for failure to turn over DMV record information, "which was available to the defendant in a place where a reasonable defendant would have looked." *Sanders v. Johnson*, 191 Fed.Appx. 240, 244 n.2 (4th Cir. 2006), *cert. denied*, 127 S.Ct. 2433 (2007) (citing *Wilson* with approval).

Petitioner's statement that "[t]he Fifth Circuit also agrees that the defendant's own knowledge is irrelevant in *Brady* cases" (Pet. 26) is based merely on dicta and unpublished authority; it also ignores published authority to the contrary. *Johnson v. Dretke*, 394 F.3d 332 (5th Cir. 2004), the one published case on which petitioner relies, held only that the habeas petitioner was entitled to a certificate of appealability on his claim that he had satisfied the gateway requirements under 28 U.S.C. §2244(b)(2)(B)(i) for filing a successive habeas petition. It did not involve the merits of a *Brady* claim or even of the underlying cause analysis under §2244(b).[8]

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[8] *Mathis v. Dretke*, 124 Fed.Appx. 865 (5th Cir. 2005), the unpublished decision on which petitioner relies, likewise involved only the determination whether to grant a COA.

Moreover, petitioner overlooks subsequent authority that directly refutes his statement. In *United States v. Infante*, 404 F.3d 376 (5th Cir. 2005),[9] the Fifth Circuit held that there was no *Brady* violation for the government's failure to disclose impeachment information about a witness, because the information "was a matter of public record." 404 F.3d at 387. "*Brady* rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence." *Id.*, 404 F.3d at 386 (quoting *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983)). *See United States v. Valles-Zamora*, 252 Fed.Appx. 701, 703 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1455 (2008) (citing *Infante* with approval).

Petitioner's claim that "[t]he Tenth Circuit also agrees [that the defendant's own knowledge is irrelevant]" is at best dubious. In *United States v. Quintanilla*, 193 F.3d 1139 (10th Cir. 1999), which petitioner cites, the Tenth Circuit actually rejected a *Brady* claim because the potentially exculpatory evidence "was known to [the] defendant well before trial." 193 F.3d at 1149. While the court did cite *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), for the proposition that "whether a defendant knew or should have known of the existence of potentially exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information," it went on nevertheless to say that "a defendant's independent awareness of the exculpatory evidence is critical in

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[9] *Infante* was decided on March 21, 2005 — ten days after *Mathis*.

determining whether a *Brady* violation has occurred." *Quintanilla*, 193 F.3d at 1149.[10] "If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial." *Id.*[11] But this is just another way of saying that there is no *Brady* violation because disclosure by the state was *unnecessary*, *i.e.*, the evidence was not concealed, hidden, or "suppressed." *See United States v. Hernandez-Muniz*, 170 F.3d 1007, 1010 (10th Cir. 1999) ("There could be no suppression by the state of evidence already known by and available to [defendant] prior to trial.") (quoting *DeBerry v. Wolff*, 513 F.2d 1336, 1340 (8th Cir. 1975)). *See also Spears v. Mullin*, 343 F.3d 1215, 1256 (10th Cir. 2003) (citing *Hernandez-Muniz* with approval).

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[10] The Sixth Circuit majority in this case similarly observed that "the government's withholding of evidence does not necessarily mean that it has suppressed the evidence for purposes of ascertaining whether a *Brady* violation has occurred. And whether a *Brady* violation is ultimately found is not determinative of the extent of the prosecutor's broad duty to disclose exculpatory evidence." (Pet.App. 23a-24a n.7)

[11] Petitioner dismisses the significance of this statement as nothing but "an entirely reasonable observation" (Pet. 26 n.5), but one need only make the "entirely reasonable" addition of the words "access to" after the fifth word of the sentence in order to bring it in line with the decision of the Sixth Circuit in this case.

B. Any Split That Exists Among the Circuits Is on a Question Other Than the One Presented in this Case.

Decisions in the Fourth, Fifth, and Tenth Circuits being more in accord than in conflict with the decision of the Sixth Circuit in this case, petitioner is left only with his claim of a conflict with the Ninth Circuit. In support of this claim, he cites the decision in *Gantt v. Roe*, 389 F.3d 908 (9th Cir 2004). While *Gantt* does appear to set forth the state of the law in the Ninth Circuit, it nevertheless can be distinguished from the Sixth Circuit decision in this case — for the very same reasons that this Court's decisions in *Strickler* and *Banks* can be so distinguished. Consequently, there is no conflict between the Sixth and Ninth Circuits — at least not on the question presented by this case: whether evidence available to the defendant in a public record that he had every reason to look at has been "suppressed" under *Brady*.[12]

Like *Strickler* and *Banks*, *Gantt* did not involve information even "remotely similar to the public sentencing records not given to the defense in this case." (Pet.App. 22a) In *Gantt* the prosecution failed to disclose information it had obtained through the police investigation regarding the significance of a piece of evidence — a matchbook found on the

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[12] Petitioner says that the Sixth Circuit "has applied its rule in two additional cases." But the decisions in *Johnson v. Bell*, 525 F.3d 466, 477 n.8 (6th Cir. 2008), and *Lewis v. Tennessee*, 2008 WL 698935 (6th Cir. Mar. 14, 2008), demonstrate that the Sixth Circuit's "rule" is limited to evidence that is *publicly available*.

petitioner's person — that it relied upon to prove identity at trial. *Gantt*, 389 F.3d at 910-911. And like *Strickler* and *Banks*, therefore, *Gantt* involved "information known to investigating officers that defendants had no reason to know about and that could not have been discovered by defendants without an extensive and possibly fruitless investigation." (Pet.App. 22a) *See Gantt*, 389 F.3d at 911 ("prosecution in a criminal case has a duty to disclose all material evidence *in its possession* that is favorable to the accused") (emphasis added).

Moreover, in *Gantt* the prosecution had affirmatively represented that it was keeping the defense apprised of developments in the investigation. *Gantt*, 389 F.3d at 913. "Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.* The state made no such representation in this case. Furthermore, as discussed above, the defense simply did not rely on the representation the state did make for production of the witness' sentencing records; even if it had, any such reliance would not have been reasonable given the public availability of the evidence and all the reasons why petitioner knew to look at it.[13]

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[13] The lack of actual reliance in this case likewise undermines petitioner's attempt to present a circuit split on the basis of decisions hinging on such reliance. (Pet. 28-31)

CONCLUSION

The petition for a writ of certiorari should be denied.

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(2)

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In the Supreme Court of the United States

STEPHEN M. BELL,

PETITIONER,

v.

RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

The brief in opposition essentially concedes that certiorari is warranted. Respondent acknowledges that the *en banc* Sixth Circuit held that criminal defendants are charged with knowledge of any evidence that is "publicly available" or "reasonably available" from another source, and that prosecutors have no obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose such information even if it is exculpatory. Respondent concedes that that holding is the subject of a square and acknowledged circuit split, although he disputes how particular circuits line up. And he essentially concedes all the critical facts—that the government's star witness unilaterally approached the prosecution with an offer of testimony in this case in exchange for leniency on pending charges and help with parole, that the prosecution granted leniency and assistance, and that none of this was disclosed to Bell despite his timely request for all exculpatory and impeachment evidence in the government's possession. Indeed, the prosecution affirmatively assured both Bell and the jury that no such evidence existed.

Respondent's effort to reconcile the Sixth Circuit's holding with this Court's decisions (and with the decisions of other conflicting circuits) rests on a fundamental misunderstanding of the question reserved by this Court in *Strickler v. Greene*, 527 U.S. 263, 287–88 (1999). In *Strickler*, this Court reserved decision on whether a defendant could make out a *Brady* claim if he had actual knowledge of the factual basis for that claim but simply lacked documentary or other *proof*—and could have obtained that proof from reasonably available sources. That question arose in the context of the "cause and prejudice" standard for

excusing a prior procedural default on federal *habeas* review, and the scenario this Court had in mind was a defendant who was told, for example, that the prosecution's star witness had been granted leniency for his testimony but simply was not given the sentencing records necessary to prove it. A defendant in that situation may lack "cause" for failing to assert on direct review a *Brady* claim premised on the prosecution's failure to turn over the sentencing records.

Properly understood, however, that has nothing to do with a case like this one—where the defendant was not even told the witness had been granted leniency, and in fact was affirmatively misled on that issue. Respondent, like the Sixth Circuit below, leaps from this Court's suggestion that a defendant with *actual knowledge* may not have a viable *Brady* claim to the unwarranted conclusion that a defendant is barred by *constructive knowledge* of the factual basis for his claim—and then charges all defendants with constructive knowledge of everything that is theoretically available somewhere in public records, even if the defendant does not know the information is available and has been assured by the prosecution that it does not exist.

The Sixth Circuit's rule conflicts with decisions of this Court and further entrenches a mature eleven-circuit conflict. The Sixth Circuit has applied the rule adopted here in subsequent cases. *See* Pet-27;[1] *Lewis v. Tennessee*, No. 05-5661, 2008 WL 698935, at *2 (6th Cir. Mar. 14, 2008), petition for cert. filed July 28, 2008

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[1] "Pet-" references the Petition for a Writ of Certiorari; "BIO-" references the Brief in Opposition; and "CAJA-" references the Joint Appendix in the Sixth Circuit.

(No. 08-119); *Johnson v. Bell*, 525 F.3d 466, 477 n.8 (6th Cir. 2008) ("[A]s this document was publically [sic] available, it simply does not present a *Brady* issue."). The rule is inconsistent with the practical realities of the criminal process, reintroduces the same incentives for prosecutorial gamesmanship that *Brady* was designed to eliminate, and will infect countless disclosure decisions made on the front lines of the criminal justice system on a daily basis until this Court grants review to correct it. Certiorari is warranted.

1. Respondent does not dispute any of the key facts, including that:

- Davenport unilaterally solicited a meeting with prosecutors and made demands for leniency in return for providing testimony against Bell;
- the prosecution met twice with Davenport and shortly after the meetings four pending charges against Davenport were dropped and he received vastly reduced sentences on two other pending charges;
- the prosecutor wrote a letter to the parole board requesting parole for Davenport at the earliest possible date because his testimony was essential to Bell's conviction;
- *none* of this was disclosed to Bell, despite defense counsel's explicit request for such information, and that Bell had no actual knowledge of any of it;
- the prosecutor further misled Bell and bolstered Davenport's credibility by falsely telling the jury that Davenport had no ulterior motive for testifying, that the defense's suggestion that Davenport "wants

early parole through our office or through me" was not true, and that his office had no "say-so with the Parole Board"; and

- the evidence at issue in this case was impeachment material under *Brady*, and nondisclosure obviously prejudiced Bell because Davenport's testimony was the only evidence of identity and motive and the only evidence establishing the premeditation sufficient for the first-degree murder conviction.

Those undisputed facts make this case an ideal vehicle for this Court to resolve the entrenched conflict over whether prosecutors have an obligation under *Brady* to disclose all exculpatory and impeachment material in their possession, even information that is theoretically available somewhere in public records if the defendant knew to look (and where to look).

2. Most of the brief in opposition is built on a misunderstanding of the question this Court reserved in *Strickler*, which was whether "cause" might be negated if the defendant had actual knowledge of the factual basis for his *Brady* claim, and the ability to obtain the necessary *proof* through the exercise of reasonable diligence. 527 U.S. at 287–88. Respondent concedes that the Sixth Circuit and the First, Second, Third, Seventh, Eight, and Eleventh Circuits have transformed this possible exception related to *actual knowledge* into a holding that "cause" is negated whenever the evidence was "publicly available" or "reasonably available" from another source. Pet-19–27. The rule in these circuits effectively charges defendants with *constructive knowledge* of all materials

in public files or that hypothetically could have been discovered with a diligent investigation.

Respondent argues that a defendant has "access to" all exculpatory and impeachment evidence that does not reside *exclusively* in the prosecution's possession, BIO-21, and that such "access" absolves the prosecution of any disclosure obligation under *Brady*. His position appears to be that anything that is "publicly available" or "reasonably available" from another source through a defendant's diligent investigation is not in the prosecution's possession, and therefore the prosecution cannot be accused of playing "hide and seek." BIO-12–13, 21.

This is sophistry, and a frontal assault on the core holding of *Brady*. In light of the prosecutor's special role in the criminal process, this Court held in *Brady* that the prosecution is required to disclose *all* exculpatory or impeachment material in its possession in order to eliminate strategic gamesmanship that undermines the search for truth. Pet-13–14. This Court has never suggested that prosecutors can pick and choose what to disclose by speculating about what the defendant might be able to locate elsewhere with a "reasonably" diligent independent investigation. The whole point of *Brady* is that the prosecution has no legitimate interest in withholding *any* exculpatory or impeachment evidence from the defense, and that justice is best served if criminal trials are conducted with all such evidence out in the open.

Respondent's position, and that of the Sixth and several other circuits, invites prosecutors to play exactly the games that *Brady* was designed to eliminate. Indeed, it would allow prosecutors to withhold essentially any exculpatory or impeachment

material from the defense simply by placing it in an archive theoretically open to the public. (The government warehouse at the end of *Raiders of the Lost Ark* comes to mind.) And it requires reviewing courts to engage in impossible line-drawing exercises about just how accessible the evidence was, and just how much knowledge the defendant had.

The rule adopted by the Sixth Circuit is also simply inconsistent with the realities of criminal practice. Criminal defendants do not have the time or the resources to slog through public records located in the basements of courthouses or elsewhere. Most are incarcerated, and represented by appointed counsel who are struggling with case loads that preclude substantial independent investigation. *See, e.g., Lewis v. Tennessee*, Petition for a Writ of Certiorari at 22 n.5 (U.S. No. 08-119) (noting that a defense attorney in the Bronx office of the Legal Aid Society of New York maintains an open file of approximately 105 cases; public defenders in Louisiana and Massachusetts face maximum workload standards of 200 felonies and 400 to 450 misdemeanors per year, and public defenders in Oregon will handle up to 240 felonies and 400 misdemeanors per year). And Respondent's assertion that a search of public records is not really "any investigation whatsoever" is absurd. *Lewis* illustrates the point: the Sixth Circuit applied the holding in this case to fault a defendant for not uncovering a report in the NCIC database, access to which is subject to strict legal limitations. *Lewis* Pet. 7 & n.1.

3. Respondent argues that this case does not conflict with *Strickler* or *Banks v. Dretke*, 540 U.S. 668 (2004), because those "cases involved information known only by the prosecution that was hidden or

concealed from the defendant." BIO-12. In contrast, Respondent claims, "the information at issue in this case 'was a matter of public record'" and therefore not "hidden or concealed" from Bell. This reasoning only demonstrates how untenable the Sixth Circuit's rule is.

In *Strickler*, the government argued that "an examination of [the prosecution witness's] trial testimony, as well as a letter published in a local newspaper"—clearly publicly available information—put the defendant on notice of the factual basis for his claim and required him to investigate further. 527 U.S. at 284–85 (footnote omitted). But this Court held that although Strickler's lawyers "must have known that [the witness] had had multiple interviews with the police, it by no means follows that they would have known that records pertaining to those interviews, or that the notes that [the witness] sent to the detective, existed and had been suppressed." *Id.* at 285. Likewise here, although Bell's counsel obviously knew that Davenport was incarcerated, it by no means follows that he should have had knowledge that Davenport had sought out the prosecution and requested numerous favors in return for his testimony; that the prosecution then dropped four pending charges against him and entered a favorable plea agreement on two others; and that it intended to support his parole application in return for his testimony. Pet-17.

Respondent also does not dispute that the prosecution represented to Bell's counsel that it had turned over all *Brady* material in its files. Both *Strickler* and *Banks* hold that Bell "cannot be faulted for relying on that representation." *Banks*, 540 U.S. at 693, 696 ("A rule ... declaring 'prosecutor may hide,

defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). Like *Strickler*, where the prosecution continued to represent throughout the litigation that it had complied with its *Brady* obligations, at Bell's trial the prosecutor falsely told the jury that Davenport had no ulterior motives for testifying, that the defense's suggestion that Davenport had sought early parole from the prosecution was not true, and that the prosecution's office had "no say-so" with the parole board. Pet-18.

Respondent concedes that the Sixth Circuit expressly held that Bell was not entitled to rely on these representations, BIO-14, and embraces the position that "any such reliance [on the prosecution's representations of compliance with its *Brady* obligations] would not have been reasonable given the public availability of the evidence," BIO-21. Despite the prosecution's representation that the specific evidence at issue *did not exist*, Respondent asserts that Bell "had every reason to" seek it out—which appears to be another way of saying that criminal defendants have every reason to assume that prosecutors are lying. This Court said *the exact opposite* in *Strickler* and *Banks*, and Respondent forthrightly concedes that the Sixth Circuit's holding conflicts on this point with the holdings of at least *seven* courts of appeals. BIO-21 & n.13; Pet-28–31; *Strickler*, 527 U.S. at 283 n.24; *Banks*, 540 U.S. at 693, 696, 695 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.").

Respondent's only real defense is a misleading and demonstrably false assertion that Bell's trial counsel "expressly disavowed reliance on the representation of the prosecutor" and testified "that it was reasonable for the prosecution to expect that petitioner would obtain this information on his own." BIO-15. But Bell's trial counsel testified that he "really expected ... if there was information relevant to [his discovery request]" that "the prosecutor would have turned over this kind of information," and that he had "no basis to believe" that the prosecution had withheld any impeachment evidence about its favorable treatment of Davenport. CAJA-445. Respondent quotes trial counsel's response to a question about whether he could hypothesize any reason why the prosecution would not have turned over the evidence. Counsel responded that it would not surprise him "if the *DA's position*" was that he should uncover it himself, but that he "really expected" the prosecution to turn over the evidence he requested "if there was information" that existed. *Id.* (emphasis added).

4. Respondent concedes the existence of a square and acknowledged circuit split, and argues only that the petition "overstates the dimension of any such split." BIO-15. Respondent agrees that the Sixth Circuit's decision is consistent with the law in the First, Second, Third, Seventh, Eighth, and Eleventh Circuits, and that the Ninth Circuit's decisions are in conflict. His attempts at distinguishing the conflicting cases from the Fourth and Tenth Circuits are unpersuasive. Respondent's analysis of the Fifth Circuit cases demonstrates that court's confusion.

First, Respondent does not dispute that the Fourth Circuit's decision in *Walker v. Kelly*, 195 Fed. Appx.

169 (4th Cir. 2006), is irreconcilable with the Sixth Circuit's decision. He argues only that the decision is unpublished and that the Fourth Circuit's published decision in *Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir.), *cert. denied*, 516 U.S. 972 (1995), still governs. BIO-16–17. But in *Walker* the Fourth Circuit originally applied its holding from *Barnes*, but then completely reversed course when this Court granted, vacated, and remanded the case in light of *Banks*. 546 U.S. 1086 (2006). The Fourth Circuit then rejected its prior decisions and held that the defendant's knowledge is irrelevant to the prosecution's disclosure obligations. *Compare Barnes*, 58 F.3d at 976 ("Even assuming 'some interference by officials' ... a petitioner still cannot show cause if the information sought is otherwise reasonably available."), *with Walker*, 195 Fed. Appx. at 175 ("[T]he cause analysis focuses on prosecutorial misconduct, not on the defendant's diligence."). The Fourth Circuit obviously felt no need to publish its second *Walker* opinion because it believed that holding to be clearly required by *Banks*. There is every reason to believe subsequent Fourth Circuit panels will reach the same conclusion.

Second, Respondent claims that the Tenth Circuit's decisions are not inconsistent with the Sixth Circuit's decision here because the Tenth Circuit rejected a *Brady* claim where the exculpatory evidence was "known" to the defendant. BIO-18. Respondent further asserts that the Tenth Circuit's cases can be reconciled with the Sixth Circuit by modifying the Tenth Circuit's holding that a defendant cannot prevail if he "already has a particular piece of evidence," to a holding that a defendant cannot prevail if he "already has ['access to'] a particular piece of evidence." BIO-19

& n.11. Of course that reasoning illustrates Respondent's fundamental misunderstanding, and shows precisely why Tenth Circuit precedent *is not* consistent with the Sixth Circuit's holding here.

Third, Respondent points to the Fifth Circuit's decision in *United States v. Infante*, in which the prosecution failed to turn over evidence that the government's "star witness" had sought a psychiatric exam in a related case. 404 F.3d 376, 387 (5th Cir. 2005). The Fifth Circuit rejected Infante's *Brady* claim because the information was in the co-conspirator's case file which "was a matter of public record[] that he could have obtained ... upon request." *Id.* Ten days earlier, however, the same court held that information's "'location in the public record, in another defendant's file, is immaterial,'" to whether the prosecution violated *Brady*. *Mathis v. Dretke*, 124 Fed. Appx. 865, 877 (5th Cir.) (citation omitted), *cert. denied*, 545 U.S. 1131 (2005). And in *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004), the Fifth Circuit held that: "In finding procedural default, the district court relied upon the fact that [the accomplice's] stipulation was available in the public record. However, if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." Respondent succeeds, therefore, only in showing that the Fifth Circuit is hopelessly confused.

5. Respondent also does not dispute that the Sixth Circuit and other courts of appeals have conflated the habeas standards for cause and prejudice with the substantive scope of a prosecutor's *Brady* obligations in the first instance—thereby importing the habeas rules into cases on direct review or with no procedural

default. *E.g.*, *United States v. Coker*, 514 F.3d 562, 570 (6th Cir. 2008); Pet-20–23. This Court could easily clarify the applicable principles in the course of resolving this case.

CONCLUSION

The *en banc* Sixth Circuit decided a question of enormous daily practical importance to the administration of justice, in conflict with decisions of this Court and other courts of appeals. The circuit conflict is deep and robust, and the Sixth Circuit's position is profoundly and dangerously wrong. The petition for certiorari should be granted.

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